80-990

No. .....

Supreme Court, U. S.
FILED
DEC 17 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1980

CLARENCE E. CABELL, in his official capacity as Acting Chief Probation Officer of Los Angeles County; JACQUALINE HASENSTAB, in his official capacity as Personnel Officer for the Los Angeles County Probation Department; GORDON T. NESVIG, in his official capacity as Chief Personnel Officer for the County of Los Angeles; and the COUNTY OF LOS ANGELES, a body politic;

Appellants,

vs.

JOSE CHAVEZ-SALIDO, RICARDO BOHORQUEZ, and PEDRO LUIS YBARRA,

Appellees.

On Appeal From the United States District Court for the Central District of California.

JURISDICTIONAL STATEMENT.

JOHN H. LARSON, County Counsel,
WILLIAM F. STEWART, Chief
Labor Relations Division,
648 Hall of Administration,
500 West Temple Street,
Los Angeles, Calif. 90012,
(213) 974-1829,
Attorneys for Appellants.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

No. .....

IN THE

Supreme Court of the United States

October Term, 1980

CLARENCE E. CABELL, in his official capacity as Acting Chief Probation Officer of Los Angeles County; JACQUALINE HASENSTAB, in his official capacity as Personnel Officer for the Los Angeles County Probation Department; GORDON T. NESVIG, in his official capacity as Chief Personnel Officer for the County of Los Angeles; and the COUNTY OF LOS ANGELES, a body politic,

Appellants,

vs.

JOSE CHAVEZ-SALIDO, RICARDO BOHORQUEZ, and PEDRO LUIS YBARRA,

Appellees.

JURISDICTIONAL STATEMENT.

Questions Presented.

1. Does a deputy probation officer in light of California's statutory duties fall within that group of public service positions which the state and local governments may reserve for American citizens; Is California's statute which requires deputy probation officers as peace officers to be United States citizens unconstitutional as applied?

2. Is the California statute which provides that public officers declared by law to be peace officers must be citizens of the United States unconstitutionally overbroad when considered in light of a separate companion statute which specifically declares deputy probation officers to be peace officers?

3. Did the plaintiffs who were applicants only for the deputy probation officer position have standing to challenge California Government Code Section 1031a as overbroad because it included by separate statutory reference other job categories.

TABLE OF CONTENTS

	Page
Questions Presented	i
Opinions Below	1
Jurisdiction	1
State Statute Involved	2
Statement of the Case	2
Compelling Reasons Support Plenary Consideration	4
I.	
Probation Officers in California Are a Class of Public Employees That Can Be Required to Be United States Citizens	6
II.	
A Statute Which Provides That "Each Class of Public Officers or Employees Declared by Law to Be Peace Officers" Shall Be a Citizen of the United States Is Not Constitutionally Overbroad When a Separate Companion Statute Specifies That Probation Officers Shall Be Peace Officers	14
III.	
Plaintiffs Have No Standing	18
Conclusion	19

INDEX TO APPENDICES

Appendix A. Opinion	App. p. 1
Dissenting Opinion	14
Appendix B. Final Judgment	25
Appendix C. Notice of Appeal to the Supreme Court of the United States	31
Appendix D. Opinion	34
Appendix E. California Code of Civil Procedure, Section 131.4	66

TABLE OF AUTHORITIES

Cases — Page

Ambach v. Norwich, ... U.S. ...., 99 S.Ct. 1589 (1979) 5, 6, 7, 8

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 15, 16

Chavez-Salido v. Cabell, ... F.2d ...., 23 FEP Cases 112 ..... 7, 17

Foley v. Connelie, 435 U.S. 291, 17 FEP Cases 1 (1978) 1, 5, 6, 7, 8, 13, 17

Sugarman v. Dougall, 413 U.S. 634 (1973) 14, 17

United States v. Raines, 362 U.S. 17 (1960) 15

Constitution

United States Constitution, First Amendment 17

United States Constitution, Fourteenth Amendment ... 3

Statutes

California Code of Civil Procedure, Sec. 131.3 2

California Code of Civil Procedure, Sec. 131.4 .... 2, 6, 9

California Government Code, Sec. 1031 ..... 5, 17

California Government Code, Sec. 1031(a) .... ii, 2, 3, 4, 6, 14, 17, 18

California Penal Code, Sec. 830.1 ..... 6, 18

California Penal Code, Sec. 830.5 ..... 2, 6, 9, 14

California Penal Code, Sec. 1203 ..... 2, 10

California Penal Code, Sec. 1203.1 ..... 2, 9

California Penal Code, Sec. 1203.1a 2, 9, 10

California Penal Code, Sec. 1203.2 ..... 2, 9

California Penal Code, Sec. 1203.10 2

California Penal Code, Sec. 1203.13 ..... 2, 11

California Penal Code, Sec. 1203.14 ..... 2, 11

California Penal Code, Secs. 11175-11179 10

Page

California Welfare and Institutions Code, Sec. 236 ..... 2, 11
California Welfare and Institutions Code, Sec. 280 ..... 2, 11
California Welfare and Institutions Code, Sec. 283 ..... 2, 6, 9
California Welfare and Institutions Code, Sec. 300 ... 11
California Welfare and Institutions Code, Sec. 305 ... 11
California Welfare and Institutions Code, Sec. 309 ... 11
California Welfare and Institutions Code, Sec. 325 ... 11
California Welfare and Institutions Code, Sec. 326 ... 11
California Welfare and Institutions Code, Sec. 356 ... 11
California Welfare and Institutions Code, Sec. 627.5 10
California Welfare and Institutions Code, Sec. 628 ..... 2, 10
California Welfare and Institutions Code, Sec. 630 ..... 2, 10
California Welfare and Institutions Code, Sec. 727 ..... 2, 11
California Welfare and Institutions Code, Sec. 730 ..... 2, 11
California Welfare and Institutions Code, Sec. 731 ..... 2, 11
United States Code, Title 28, Sec. 1253 1
United States Code, Title 28, Sec. 1331(a) 3
United States Code, Title 42, Sec. 1981 ..... 3, 4
United States Code, Title 42, Sec. 1983 3

This is the second time this case has been appealed to the United States Supreme Court. In acting on the original appeal, this Court in an order dated May 15, 1978, vacated the judgment of the three-judge district court and remanded the case for further consideration in light of *Foley v. Connelie*, 435 U.S. 291 (1978).

Opinions Below.

The Order of the Chief Judge of the Circuit Court convening the three-judge court and the basis for such action is set forth in the initial opinion of the three-judge district court, dated February 3, 1977, and is reproduced in Appendix D, p. 39, note 4, to this Jurisdictional Statement. The jurisdictional basis for the Court's action was readopted in their subsequent opinion dated June 4, 1980, and reproduced in Appendix A, p. 2.

The opinion of the three-judge district court (including dissent) dated June 4, 1980, from which this appeal is taken is not reported. It is reproduced in Appendix A, pp. 1-24, to this Jurisdictional Statement.

The opinion of the three-judge district court, dated February 3, 1977, is reported at 427 F.Supp. 158 (C.D. CA). It is reproduced in Appendix D, pp. 34-35.

Jurisdiction.

The jurisdiction of this Court is conferred by 28 U.S.C. Section 1253.

The judgment of the three-judge district court was entered August 19, 1980 and is reproduced in Appendix B, pp. 25-30 to this Jurisdictional Statement.

The Notice of Appeal to this Court was filed on October 20, 1980 and is reproduced in Appendix C, pp. 31-33.

State Statute Involved.

California Government Code Section 1031(a) provides in pertinent part:

> "Each class of public officers or employees declared by law to be peace officers shall meet at least the following minimum standards:
>
> (a) Be a citizen of the United States;. . ."

California Penal Code Section 830.5 provides in pertinent part:

> "(a) Any parole officer of the State Department of Corrections, placement or parole officer of the Youth Authority, probation officer, or deputy probation officer is a peace officer. . ."

Other California statutes important to the resolution of the issues presented in this case include Penal Code Sections 1203, 1203.1, 1203.1a, 1203.10, 1203.2, 1203.13, 1203.14, 11175-11179; Welfare and Institutions Code Sections 236, 283, 280, 628, 630, 727, 730, 731; and Code of Civil Procedure Sections 131.3, 131.4.

Statement of the Case.

As noted, this is the County of Los Angeles' second appeal in this action, the original judgment having been ordered vacated by this Court on May 15, 1978. 436 U.S. 901.

Appellees Chavez-Salido, Ybarra and Bohorquez, as of the date the complaint was filed, were lawfully admitted permanent resident aliens living in Los Angeles County. Appellee Chavez-Salido applied for the job of Deputy Probation Officer II on March 27, 1975. On the required civil service examination, Chavez-Salido scored a passing grade of 95. In September he was informed a job opening existed but would have to show proof of citizenship to be appointed to the position. Solely because he was unable to do so, he

was denied this position. Chavez-Salido applied for and was granted citizenship on March 15, 1976.

Appellee Ybarra applied for the positions of Deputy Probation Officer I and II in October and August of 1975 respectively. He was informed of the citizenship requirement for both positions and, being unable to show proof of his citizenship, was denied employment as a DPO I and a position on an eligibility list for DPO II. These denials were solely the result of the statutory citizenship requirement of Section 1031(a) of California's Government Code. Ybarra has not applied for American citizenship.

Appellee Bohorquez applied for the position of Deputy Probation Officer II in January of 1975. During the civil service examination, he was informed he could not be appointed to the position because of his lack of citizenship. In light of this information, he did not avail himself of his right to appeal the failing score he received on his examination. At the time of the court's decision, Bohorquez had not filed for United States citizenship.

Appellees commenced this action for injunctive and declaratory relief under the Equal Protection Clause of the Fourteenth Amendment and Sections 1981 and 1983 of Title 42 U.S.C. Their claim was unlawful discrimination based on alienage. Damages were sought by two of the claimants.

All parties agreed a three-judge court was appropriate and on April 26, 1976 the Chief Judge for the Ninth Circuit convened the court from which this appeal is being taken. The case was originally tried and argued August 20, 1976 on stipulated facts.

The district court held it had jurisdiction over the County of Los Angeles under 28 U.S.C. Section 1331(a) in that Appellees' complaint stated a cause of action under both

the Fourteenth Amendment and 42 U.S.C. Section 1981 and the amount in controversy exceeded $10,000.

In an opinion filed February 3, 1977, and published at 427 F.Supp. 158, 17 FEP Cases 646 (C.D. Cal. 1977) (Appendix D herein), the three-judge district court declared California Government Code Section 1031a to be unconstitutional, finding that the statute involved a suspect classification to which the strict scrutiny test must be applied.

The district court's decision was appealed to the United States Supreme Court. In an order dated May 15, 1978, this Court ordered the judgment of the three-judge district court vacated and remanded the case to the three-judge court "for further consideration in light of *Foley v. Connelie*, 435 U.S. 291, 17 FEP Cases 1 (1978)." 436 U.S. 901, 17 FEP Cases 699 (1978). The matter was rebriefed and reargued before the three-judge district court on December 8, 1979.

In an opinion filed June 4, 1980, the three-judge district court, with Judge Curtis dissenting, again reached the same result, declaring Section 1031a of the Government Code unconstitutional on precisely the same grounds stated in their earlier decision. The court again found that the statute was 1) constitutionally overbroad and 2) the statute as applied denied the plaintiffs the equal protection of the law. (Appendix A, pp. 2-3). The court rejected appellants' argument that the plaintiffs who were only applicants for the deputy probation officer position lacked standing to challenge the statute's application to other classifications of peace officer. (Appendix A, p. 7, note 7).

Compelling Reasons Support Plenary Consideration.

The decision below misapplied and consequently erroneously narrowed the permissible scope of a citizenship requirement for public employees contrary to this Court's guidance and the newly developed standards established in

Foley v. Connelie, 435 U.S. 298 (1978) and *Ambach v. Norwick*, ... U.S. ...., 99 S.Ct. 1589 (1979). It is clear that in California, and undoubtedly in all other jurisdictions, deputy probation officers exercise some of the most essential powers of government—those powers directed toward the punishment and rehabilitation of criminals. Probation officers are an integral component of the criminal justice system, execute important and broad public policy in that area, and perform a vital role in one of the most basic functions of state government.

When the holding is considered in light of the other governmental occupations previously held to justify a citizenship requirement, it is clear that the decision below signals a retreat from the principles enunciated in *Foley* and *Ambach*. The district court's decision if it becomes the established law would create an inexplicable dichotomy in the application of citizenship standards to probation officers and to police and others performing roles in the administration of the criminal justice system such as judges, jurors and public prosecutors. The court's opinion will necessarily serve to confound the law, and inject confusion and error in the application of the *Foley* and *Ambach* criteria in future cases involving public employees.

The decision holding that Government Code § 1031 is unconstitutionally overbroad is erroneous in light of California's statutory scheme which identifies in separate and severable statutes those occupations granted peace office status. The impact of the court's action extends beyond the probation officer position. It also had the effect of striking down an admittedly valid citizenship requirement for police

officers effectuated through the same statute.[1] Moreover, the district court had no jurisdiction to reach its "overbreadth" finding because the plaintiffs, as applicants only for the deputy probation officer position, lacked standing to challenge the statute's application to other categories of peace officers.

I.

Probation Officers in California Are a Class of Public Employees That Can Be Required to Be United States Citizens.

Deputy Probation Officers (hereafter referred to as probation officers)[2] by virtue of their statutory duties perform functions that not only conform to, but actually exceed the threshold criteria recognized by this Court in *Foley* and *Ambach* as justifying a citizenship requirement. The majority below, while recognizing that employment activities which promote civic virtues, serve as role models for members of society, and influence the attitude of the public toward its government and the justice system, are indicia of membership in the political community that may be reserved to citizens, inexplicably ignored these criteria when applied to the probation officer position.

---

[1]Police officers are declared to be peace officers in California's Government Code §830.1, which states in relevant part:

> "Any sheriff, undersheriff, or deputy sheriff, regularly employed and paid as such, of a county, any policeman of a city, . . . is a peace officer."

A citizenship requirement for police officers is imposed in the same manner as for probation officers—through § 1031a by reference to Penal Code § 830.1.

[2]The duties of a deputy probation officer in California are the same as his principal, the Probation Officer, and both are included within the citizenship requirement. (Code of Civil Procedure § 131.4, Penal Code 830.5, Welfare & Institutions Code § 283, Appendix E.)

The majority, in contrasting a probation officer's duties and role with those of teachers and police officers, concluded that this classification of public servants has a "far, far less" effect on the governmental and political process. *Chavez-Salido v. Cabell.* Appendix A at 8. This conclusion is premised on findings that probation officers do not deal with the bulk of the community, do not teach or have a teacher-pupil relationship with probationers, have limited power of arrest, and the exercise of their discretion while broad is less important than a police officer's because it lacks "finality". Appendix A, p. 12.

The courts attempted distinction on these grounds lack substance. While the district court noted that deputy probation officers are generally regarded as a part of the law enforcement apparatus of the community, act as advisors to the court, and have a unique duty to the state (Appendix A, p. 11, note 8), the court ignored the implication of those observations in determining that for citizenship purposes a probation officer is not a part of the political community.

This Court's recent decisions in *Foley v. Connelie*, 98 S.Ct. 1067, 55 L.Ed.2d 287 (1978) and *Ambach v. Norwick*, 99 S.Ct. 1589, 60 L.Ed.2d 49 (1979) has clarified the law with regard to citizenship requirements for certain non-elected public positions. The Court upheld a citizenship requirement for police officers in *Foley v. Connelie* and for public school teachers in *Ambach v. Norwick*. In both cases the Court articulated important criteria governing the determination of whether a public service occupation can justifiably be restricted to United States citizens — criteria the district court in this case either ignored or clearly misapplied. In *Foley*, the court held that strict equal protection scrutiny was not required to justify a classification applicable to non-elected positions held by officers who participate directly in the formulation, execution or review of

broad public policy. In those circumstances, the state need only show some rational relationship between the interest sought to be protected and the limiting classification — *Foley, supra*, at 1070. The Court noted that "the right to govern was reserved to citizens" *supra*, at 1071.

The court proceeded to analyze the job in question. Noting that the exercise of police authority called for a high degree of judgment and discretion and that their actions had a serious impact on individuals, the Court concluded that the police officer was in no sense one of the "common occupations of the community and could not be equated with a private person engaged in routine public employment", *supra*, at 1072.

The Court found that police officers very clearly fell within the category of important non-elective officers which could be reserved for citizens. The majority observed that "it would be anomalous to conclude that citizens may be subjected to the broad discretionary powers of non-citizen police officers as it would be to say that judicial officers and jurors with power to judge citizens can be aliens", *supra*, at 1072.

In the context of a citizenship requirement for public school teachers in New York, this Court in *Ambach v. Norwich*, 99 S.Ct. 1589 (1979) restated and applied the rational basis test as follows: "They [referring to the Court's recent decisions] have not abandoned the general principle that some state functions are so bound up with the operation of the State as a governmental entity as to permit the exclusion from those functions of all persons who have not become part of the process of self-government," *supra*, at 1593.

If citizenship may be required of any teacher or police officer, it should be apparent in light of the role of probation

officers in our criminal justice system and the duties prescribed by the California statutes, that citizenship may also be required of probation officers. Probation Officers perform duties which go to the very heart of a representative government. As an integral component of the nation's law enforcement and criminal justice system, they exercise such broad and influential discretion which daily impacts on the lives of citizens that more compelling reasons support a citizenship requirement for their occupations than for teachers and police officers.

In California and undoubtedly elsewhere a deputy probation officer performs the following broad range of duties.

Probation Officers as peace officers have power of arrest (California Penal Code § 830.5, Welfare and Institutions Code § 283, and Code of Civil Procedure § 131.4) and although not as broad as that of a police officer, they have the general power of arrest within their statutory jurisdiction and may arrest upon suspicion. Violation of probation is cause for immediate rearrest by the probation officer without an arrest warrant (California Penal Code § 1203.2). Probation Officers may take into custody juveniles before and after court proceedings and have important release functions over adult offenders who are placed under their direct supervision. They may order the temporary release of inmates incarcerated in County jails for the purpose of preparing them for release to the community (Penal Code § 1203.1(a)).

Probation Officers play an important role in the criminal justice system through their supervisory responsibility over adult and juvenile offenders. They must insure that all conditions of probation are obeyed (Penal Code § 1203.1), and if they determine that a violation of probation has occurred, it is cause for the immediate arrest of the offender (Penal Code § 1203.2). Deputy Probation Officers supervise out-of-state parolees and must be familiar with, and dedicated

to, the enforcement of not only the law of California but the law of the United States and other States (Uniform out-of-State Parolee Supervision Act, California Penal Code § 11175-11179).

The Probation Officer's relationship with the court is substantial, direct, and an integral part of the criminal justice system. Probation Officers are required to report to the court factors to be considered in aggravation or mitigation of punishments for a crime and whether probation should or should not be granted (Penal Code § 1203). The Probation Officer's review of the circumstances surrounding the offense, his appraisal of the individual's prior record, his assessment of the individual's adaptability to rehabilitation and his recommendations as to sentencing and probation are compelling, if not controlling, factors as to whether a convicted person will be incarcerated and how long, or freed on a term of probation. The Probation Officer's court report which considers the social history, the past criminal record, and the current offense of the individual with a view to recommending release or incarceration is based primarily on the probation officer's judgment of what is conducive to the good of the community (Penal Code § 1203.1a).

Probation Officers in California have an extremely important and discretionary role with regard to juvenile offenders and dependent, abandoned or neglected minors. Probation Officers determine whether court proceedings should be instituted against juvenile offenders and whether to release or detain juveniles accused of criminal or delinquent acts (Welfare and Institutions Code §§ 628 and 630). They have a specific statutory responsibility to advise minors of their constitutional rights (Welfare & Institutions Code § 627.5). Probation Officers take custody of juveniles before and after court proceedings, represent the interests of the juvenile in such proceedings, prepare social studies

on the minor and make recommendations for the proper disposition of the case (Welfare and Institutions Code § 280). The care, custody, control and conduct of the minor may be given to the probation officer to supervise as best he sees fit (Welfare and Institutions Code §§ 727, 730, 731).

With regard to neglected, abandoned and abused children, the probation officer's powers are equally broad as he determines whether to file a petition to declare the minor a ward or dependent of the court and appears on behalf of the minor in proceedings against the parents to obtain custody of the child in the child's best interest.[3] In this capacity, probation officers act as a *guardian ad litem* for the juvenile and are responsible for his direct care, custody and control, as well as representing the minor's interests in Dependency Court proceedings (Welfare & Institutions Code § 326). An extremely important function is performed by probation officers in making recommendations to the court for removal of juveniles from the custody of their parents. California Welfare and Institutions Code § 356.

The role of the probation officer in structuring the attitudes of offenders as well as others towards society and in the inculcation of a belief in the need to observe the law is demonstrated by their crime prevention and adult delinquency prevention functions, whether or not probationers are involved. (Penal Code §§ 1203.13, 1203.14; Welfare and Institutions Code § 236.) In this role the probation officer deals with all adults and juveniles in the community. The probation officer, in effect, teaches individuals to be good citizens.

---

[3]California Welfare & Institutions Code §§ 300, 305, 309, 325 and 326.

Although in a very general sense the personal contacts arising from performance of a probation officer's duties may be narrower than a police officer's, the impact of their performance extends far beyond the immediate relationship between the probationer and the offender and has tremendous consequences for the American public as a whole. How well the probation officer performs his manifold tasks has vital consequences on the efficiency of the criminal justice system, how it is perceived by the public, and how well the offender is rehabilitated and assimilated into lawful society.

The size of the population a public servant deals with on a daily or routine basis is too truncated and indeed a misleading criteria for determining whether the position in question is within the category of important non-elective officers who participate in the execution of broad public policy. There are many occupations with similar characteristics that without question may properly be reserved to citizens. Trial judges, public prosecutors and jurors are relevant examples. Their immediate contact is with that narrow segment of society charged with an offense or who appear for judgment. Yet the overall role of these individuals when judged in light of their ultimate impact on our society is great. So also is the case with probation officers.

There can be no question that probation officers are directly involved in the execution of the broad public policy relative to our criminal justice system and the rehabilitation of public offenders. Probation officers are an integral and important part of the nation's law enforcement and criminal justice system — they are an essential component and partner in the law enforcement team which includes the police, the prosecutors and the courts.

The district court similarly erred in concluding that a probation officer's exercise of discretion was far less im-

portant than a police officer is because it lacked finality. The significance of "finality" is unclear as in our system of government there are very few public employees or officers whose acts can be considered "final" in any sense meaningful to the central issue herein. A police officer initiates the criminal proceedings by arrest but his role generally concludes with his testimony, if any. The term in custody of an individual arrested by a police officer pending a court hearing can be just as short as the detention of a juvenile offender by a probation officer.

The probation officer, who in many instances may initiate an arrest or revocation of probation, plays many roles before, during and after the sentencing. In a great many cases his influence continues for years after the formal judicial proceeding and when the arresting officer, the jurors and prosecuting attorney are no longer involved. We rely under our system of criminal justice primarily upon the probation officer to inculate in the offender those fundamental values and the observance of the norms of behavior and social responsibility that are necessary in a society governed by the rule of law.

The probation officer exercises great and very consequential discretion as the court's advisor on sentencing, methods of rehabilitation, the conditions and length of probation and possible revocation of probation and reincarceration. As noted earlier, a probation officer's responsibilities with regard to juveniles is broad and pervasive and in many respects has a greater long-range impact on how the juvenile ultimately relates to society than is the case with adults.

In *Foley*, this Court remarked that it would be anomalous for citizens to be subject to the broad discretionary powers of non-citizen police officers. The same observation is true of probation officers for they complete and execute the actions initially commenced by a citizen police officer and

continued on by citizen prosecutors, judges and jurors. Citizenship may properly be required as a condition for appointment as a deputy probation officer in California.

II.

A Statute Which Provides That "Each Class of Public Officers or Employees Declared by Law to Be Peace Officers" Shall Be a Citizen of the United States Is Not Constitutionally Overbroad When a Separate Companion Statute Specifies That Probation Officers Shall Be Peace Officers.

Unlike the statute and found constitutionally offensive in *Sugarman v. Dougall*, 413 U.S. 634, 635 (1973), the California statute does not declare that all civil servants must be U.S. citizens. The California statute struck down as unconstitutional provides in a much narrower fashion that "public officers declared by law to be peace officers" shall be U.S. citizens. The California legislature in a separate statute (Penal Code § 830.5) declared that probation officers are to be considered peace officers. On its face § 1031a simply cannot be enforced without consideration of companion statutes and it is this characteristic that clearly distinguishes the *Sugarman* case. Those public positions granted peace officer status are identified in severable and separate California statutes, permitting no unrestrained discretion in the public employer in requiring citizenship as a condition of employment, and allowing each job class to be separately evaluated as to the justification for a citizenship requirement.

The original decision of the three-judge district court ordered vacated by this Court declared § 1031a unconstitutional on grounds of overbreadth. In reaffirming their original decision, the majority relied solely and unjustifiably upon the *Sugarman* case, which is clearly distinguishable

on its facts and ignored this Court's guidance in *United States v. Raines*, 362 U.S. 17 (1960) and *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). We believe that dissent below properly applied the *Raines* and *Broadrick* criteria to the facts of the instant case.

In defining the role of the federal courts in declaring statutes unconstitutional this Court observed in *Raines, supra* at 20-21:

> "In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. *Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39. Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional. *United States v. Wurzbach*, 200 U.S. 396; *Heald v. District of Columbia*, 259 U.S. 114, 123; *Yazoo & Mississippi Valley R. Co. v. Jackson Vinegar Co.*, 226 U.S. 217; *Collins v. Texas*, 223 U.S. 288, 295-296; *New York ex rel. Hatch v. Reardon*, 204 U.S. 152, 160-161. Cf. *Voeller v. Neilston Warehouse Co.*, 311 U.S. 531, 537; *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 513; *Virginian R. Co. v. System Federation*, 300 U.S. 515, 558, 1 LRRM 743; *Blackmer v. United States*, 284 U.S. 421, 442; *Roberts & Schaefer Co. v. Emmerson*, 271 U.S. 50, 54-55; *Jeffrey Mfg. Co. v. Blagg*, 235 ULS. 571, 576; *Tyler v. Judges of the Court of Registration*, 179 U.S. 405; *Ashwander v. TVA*, 297 U.S. 288, 347-348; (concurring opinion)."

The same rule was followed in *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), when the Court said at 610:

> "Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court. See, e.g., *Austin v. The Aldermen*, 7. Wall. 694, 698-699 (1869); *Supervisors v. Stanley*, 105 U.S. 305, 311-315 (1882); *Hatch v. Reardon*, 204 U.S. 152, 160-161 (1907); *Yazoo & M.V.R. Co. v. Jackson Vinegar Co.*, 226 U.S. 217, 219-220 (1912); *United States v. Wurzbach*, supra, at 399; *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 513 (1937); *United States v. Raines*, 362 U.S. 17 (1960)."

After enumerating the exceptional situations in which the standing has been allowed, the Court said:

> "Application of the overbreadth doctrine in this manner is, manifestly, strong medicine. It has been employed by the Court sparingly and only as a last resort. Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute. See *Dombrowski v. Pfister*, 380 U.S., at 491; *Cox v. New Hampshire*, 312 U.S. 569 (1941); *United States v. Thirty-seven Photographs*, 402 U.S. 363 (1971); cf. *Breard v. Alexandria*, 341 U.S. 622 (1951)."

413 U.S. at 613.

As correctly noted in the dissent, the overbreadth doctrine has been applied primarily in first amendment cases. In those cases the Court could not have decided the case on a narrower basis because even if some behavior or occupation could constitutionally be restricted, the challenged statute was so broad in its terms that there would still remain

the risk of unbridled scope and discretion in its application. In first amendment cases this is a matter of particular constitutional concern because restraints on first amendment rights are justified only under the most compelling circumstances and this Court has continually condemned actions that have an unnecessary chilling effect on the exercise of those rights.

No such factors are present with regard to California's citizenship requirement for probation officers. The *Sugarman* case relied upon by the majority is clearly distinguishable as the New York Statute totally failed to restrict the citizenship requirement to any particular occupation within the extremely broad category of civil service positions. Even if under the broad civil service umbrella, there existed occupations that could justifiably be restricted to citizens (such as police officers) the New York statute simply did not identify them.

The effect of the California statute is to the contrary. The California statutes, although including a great many different occupational categories, are fundamentally different in application as the dissent observed. "[E]ach of these categories are defined with such narrowness and precision as will permit the application of constitutional principles on any category challenged. It is difficult to see how the occupation of probation officer could be more clearly defined". *Chavez-Salido v. Cabell*, ... F.2d .... , 23 FEP Cases at 112, Appendix A, p. 18.

This Court had no difficulty in ascertaining that Section 1031a can be applied narrowly for it noted in its opinion in *Foley v. Connelie*, that by virtue of § 1031, California was one of 24 states besides New York that "specifically require United States citizenship as a prerequisite for becoming a member of a statewide law enforcement agency", *supra* at 1072, note 8. (Emphasis added)

Placing the "overbreadth" factor into perspective, is there any real constitutional difference between a series of independent and separate statutes each defining an occupation and specifying a citizenship requirement and a statute that imposes a citizenship requirement by reference to other statutes, each of which separately identify the affected occupations? We believe not and that the district court misapplied the constitutional "overbreadth" doctrine under the facts of this case and unfortunately, regardless of the merits relating to the probation officer position, unnecessarily eliminated, a valid citizenship requirement for police officers in the State of California.[4]

III.

Plaintiffs Have No Standing.

All of the plaintiffs in this case were applicants for only one class of position, deputy probation officer. There were no plaintiff applicants for any of the remaining classes of public positions granted peace officer status under other separate statutes. Being totally unaffected by the application of Section 1031a to these other job classifications, plaintiffs lacked standing to assert that Section 1031a was overbroad because it included some categories, which upon careful analysis and with an aggrieved party might be found not to justify a citizenship restriction.

---

[4]Penal Code § 830.1 declares that "Any sheriff, undersheriff, or deputy sheriff . . ., any policeman of a city . . . is a peace officer." Pursuant to Government Code § 1031a now declared unconstitutional, these law enforcement officers were required to be U.S. citizens.

Conclusion.

For the foregoing reasons, it is respectfully requested that this Court note probable jurisdiction and grant plenary consideration to the instant appeal.

DATED: December 16, 1980.

JOHN H. LARSON, County Counsel,

By WILLIAM F. STEWART,

Chief Labor Relations Division,

Attorneys for Appellants.

APPENDICES

APPENDIX A.

Opinion.

CHAVEZ-SALIDO v. CABELL

U.S. District Court
Central District of California

CHAVEZ-SALIDO, et al. v. CABELL, in his official capacity as Acting Chief Probation Officer of Los Angeles County, et al., and the COUNTY OF LOS ANGELES, No. CV 76-0541-IH, June 4, 1980

Full Text of Opinion

HILL, Chief Judge: — In an opinion filed February 3, 1977, and published at 427 F.Supp. 158, 17 FEP Cases 646 (C.D. Cal. 1977), this Court declared unconstitutional California Government Code Section 1031(a). That section provides that one must be a citizen of the United States to be a peace officer or to occupy any governmental position, state, county or local, which is declared by law to have the powers of a peace officer. Plaintiffs in the case are three non-citizens, each of whom sought employment by Defendant Los Angeles County as a Deputy Probation Officer II and was refused employment solely because of the citizenship requirement of the statute.

This Court's decision was appealed to the United States Supreme Court. In an order dated May 15, 1978, the judgment of this Court was vacated and the case was remanded to this Court "for further consideration in light of Foley v. Connelie, 435 U.S. 291, 17 FEP Cases 1 (1978)." 436 U.S. 901, 17 FEP Cases 699 (1978). The matter was rebriefed and was reargued on December 8, 1979.

The facts are fully set forth in the original opinion of this Court and do not need repetition here. We likewise will not repeat herein the jurisdictional discussion of the original

opinion, which we readopt.[1] In the footnote[2] we discuss the few inconsequential factual changes occurring since the original opinion was filed.

We recognize that the views of the Supreme Court with respect to the general problem of citizenship being required for employment by state and local government agencies, have been much more fully developed and expounded in two recent cases: Foley v. Connelie, supra and Ambach v. Norwick, 441 U.S. 68, 19 FEP Cases 467 (1979).[3]

Applying the newly developed principles enunciated in Foley and Ambach, we have reached the same result as we reached before. We again hold that Section 1031(a) is unconstitutional. We reach this same result on the same

---

[1]At the second argument, counsel for Plaintiffs asked to be relieved of their prior action in which they voluntarily waived any claim against the County under 42 U.S.C. Section 1983. They point to the intervening opinion of the Supreme Court in Monell v. Dept. of Soc. Serv. of City of N.Y., 436 U.S. 658, 17 FEP Cases 873 (1978), as having changed the previous law. As we understand their papers, defendants do not dispute the County's Section 1983 liability under Monell. At this late date, we decline to relieve counsel of their previous waiver, noting that under our previous holding the County is amenable to suit under Section 1981 and that a Section 1983 remedy would be cumulative at best.

[2]As to the functions and powers of probation officers, the parties stipulated that probation officers in California are not authorized to carry weapons. In addition, this Court took judicial notice of certain sections of California law defining the powers and functions of probation officers, which sections were not mentioned in the previous opinion. i.e., Code of Civil Procedure Section 131.3 et seq.; Penal Code Section 1203 et seq.; Welfare and Institutions Code Section 280-83, 727 et seq. We do not regard any of these sections as working any material change in the description of the duties of probation officers as contained in the original opinion.

The Court was also informed that since the publication of its original opinion, Plaintiff Chavez-Salido has left County employment altogether and no longer seeks injunctive relief with reference to appointment. However, his case is not rendered moot by that fact since his prayers for back pay and attorneys fees remain viable.

[3]The Supreme Court has also spoken on the same subject in Nyquist v. Mauclet, 432 U.S. 1 (1977), but we do not regard that opinion as of importance for our purposes.

grounds as before: 1) the statute is overbroad and 2) the statute as applied denies these plaintiffs the equal protection of the law.

I.

OVERBREADTH

In our original opinion, we discussed the status of alienage under the equal protection clause as enunciated by the Supreme Court. We believe that discussion remains valid today. Nothing in the intervening opinions of the Supreme Court would in our view undermine the proposition that citizenship may be required for governmental employment only by a statute which is "narrowly drawn" and which does not sweep "too broadly."

Footnote 5 of the Foley opinion, 435 U.S. at 296, 17 FEP Cases at 3, reaffirms the continued validity of the overbreadth criterion in the following language:

> "This is not to say, of course, that a State may accomplish this end with a citizenship restriction that 'sweeps indiscriminately', [citing Sugarman] without regard for the differences in the positions involved."

In Foley, the statute requiring citizenship was narrowly drawn. It applied only to members of the New York State Police force, "State Troopers." In Norwick the statute was likewise narrowly drawn. It applied only to persons who are employed "to teach in the public schools" of the state. It is noteworthy that the New York statute involved in Norwick did not confine employment as teachers to those who had their citizenship, but permitted the employment of noncitizens who had "made application" to become citizens. The California statute with which we deal permits the employment only of persons who are already citizens and, as we pointed out in our original opinion, covers a whole host

of other occupations to which the requirement of citizenship cannot be reasonably related.

We read the new decisions of the Supreme Court as continuing to emphasize that the legislature must make a reasoned judgment as to each occupation in the field of public employment for which it requires citizenship as a prerequisite. The Court's opinions seem to require that the legislature should examine the functions, duties and responsibilities of various public jobs, position by position, and determine for each that the job is so necessarily involved with the essential power of government that it should be confined to citizens.

[CALIFORNIA ENACTMENTS]

If these are the requirements, the legislative action of the California legislature with which we are concerned does not meet them. The California legislature has for over one hundred twenty five years dealt with the subject of who is a peace officer and who, additionally, is deemed to have the powers of a peace officer. The first enactments in this field appear to go back to 1851.[4] In dozens of subsequent enactments, the legislature had added one or more public positions to the list. Until 1961, all the repeated additions to the list of peace officers were enacted without any requirement that people holding these positions should be citizens.[5] Then in 1961, in one fell swoop, the legislature passed Government Code Section 1031 which applied the mandatory citizenship requirement to all of the positions on

---

[4]See Hetherington v. Cal. State Personnel Board, 82 Cal. App. 3d 582, 172 Cal. Rptr. 300, 309 (1978) (Reynoso J., dissenting). Originally, only four positions were granted peace officer status: sheriff, policeman, marshal, and constable. Id.

[5]We note that the California Attorney General found no pre-1961 citizenship requirements for peace officers in his study of this matter. See Opinion No. 69-199, 53 A.G.Op. 63, 68 (1970).

the list. We are cited no legislative history or legislative findings which supply any basis or rationale for this broad new citizenship requirement.

In Footnote 22 of our prior opinion, we set forth the extensive list of positions covered by the California citizenship requirement of Section 1031(a). It is to be remembered that state, county and local employees are all included if they are within any of the occupational categories on the list. We believe that Section 1031(a) is void as a law requiring citizenship which "sweeps too broadly" under the Court's original holding in Sugarman and the recent Footnote 5 in Foley. There appears to be no justification whatever for excluding aliens, even those who have applied for citizenship, from holding public employment as cemetery sextons, furniture and bedding inspectors, livestock identification inspectors and toll service employees.[6] Yet all

---

[6]We note that since the publication of our original opinion, the California legislature has added a substantial number of other positions to the list appearing as Footnote 22 of the original opinion and has deleted a few positions from that list. In the interest of accuracy, the changes are hereinafter specified:

Under Section 830.1

Add: Inspectors and Investigators in Offices of District Attorney

Under Section 830.2

Add: Bay Area Rapid Transit District officers

Under Section 830.3

Add: Narcotics agents of the Department of Justice

Add: Investigators of the State Department of Health

Delete: District Attorney investigators

Delete: "members of a fire department"

Under Section 830.31

Add: Marshals and police appointed by the Director of Parks and Recreation

Under Section 830.35

Add: Policemen of the San Francisco Port Commission

Under Section 830.36

Add: Police officers appointed by the Bethel Island Municipal Improvement District

these are within the proscription of Section 1031(a) along with probation officers.

As will be discussed more fully in part II, infra, certain positions within the "political community" are subject to a less stringent equal protection scrutiny than those positions not within the "political community." For the purposes of this overbreadth analysis, it suffices to say that cemetery sextons, toll collectors, and persons in many other occupations within Section 1031(a) cannot be considered members of the political community no matter how liberally that category is viewed.

Thus, nothing has changed which would alter our original conclusion: Section 1031(a) is grossly overbroad and sweeps much too broadly in its proscription of alien employment.

Under Section 830.4

Add: Airport security officers of the City of Palm Springs

Add: Transit police officers of the Southern California Rapid Transit District

Under Section 830.10

Add: County coroners and deputy coroners

Under Section 830.11

Add: Welfare fraud investigators or inspectors, if designated by local ordinance

Under powers of peace officers:

Delete: The director, officers and employees of the Division of Aeronautics (Public Utilities Code Section 21252)

Delete: Any person vested with the power of enforcing any provisions of the Agriculture Code (Agriculture Code [now Food & Agriculture Code] Section 7)

Delete: Inspectors of the Bureau of Livestock Identification (Agriculture Code [now Food & Agriculture Code] Section 24032)

Delete: Officers and employees of the state park system (Public Resources Code Section 5007)

Delete: Sealers of the Department of Weights and Measures (Business and Professions Code Section 12013).

II.

THE STATUTE AS APPLIED

In their rebriefing and reargument, defendants again urge us to restrict our examination only to the validity of the statute as applied to deputy probation officers.[7] Defendants have pointed to nothing in the recent opinions of the Supreme Court which would justify such a limited examination. So we again observe that the decisions of the Supreme Court appear to rule out consideration of such a statute as applied. We again determine that the scrutiny to be afforded a statute of this kind must include an examination of whether it is too broad in its scope. This is the approach which the Supreme Court itself undertook in Sugarman, and, as indicated by the footnote in Foley, remains the proper approach to this day. But, out of an abundance of caution, we have again proceeded to examine Section 1031(a) as applied. We again hold the statute to be unconstitutional as applied to deputy probation officers as their functions and powers are defined in California law.

This examination of the statute as applied requires us to determine whether deputy probation officers fall within the group of public service positions which the states and local governments may reserve for American citizens. That group of positions was originally described in Sugarman as in-

---

[7]Defendants at the reargument made a contention not previously advanced by them, i.e., that these plaintiffs are confined to challenging the validity of Section 1031(a) only as it applies to probation officers, and have no standing to challenge the validity of the statute as it applies to other occupations. We reject this contention. Under standard equal protection analyses, and under the explicit approach of the Supreme Court in Sugarman, where there is a suspect classification, i.e., noncitizens, anyone affected by the statute would appear to have standing to challenge the statute on overbreadth grounds. This argument is really no different from that defendants made with respect to overbreadth, and we reject it for the same reasons as found in that section of our opinion.

volving "members of the political community". The characteristics of positions which fall within the group have been more fully expounded in Norwick and Foley.

[NORWICK CASE]

In Norwick, which held that school teachers are within the political community, the Court appears to rest the decision upon the important policy and governmental functions which public school teachers perform. The Court specifically relied on the importance of public education in our society, 441 U.S. at 76-78, and noted that the function of a schoolteacher is of paramount importance because it includes promoting civic virtues, serving as a role model and influencing the students' attitudes towards government and the political process, id. at 78-80.

We find no difficulty in holding that the function of deputy probation officers is substantially distinguishable. Probation officers do not deal with the bulk of the community. They perform none of the school teaching functions with respect either to children or adults. The relationship of probation officers to those under their supervision is far different from the relationship of a public school teacher to his pupils. The effect of probation officers on the governmental and political process is, we believe, far, far less.

In Foley the Court held that New York State Troopers were within the political community. The underlying reason was expressed as follows:

> "[I]t is because this country entrusts many of its most important responsibilities to these officers . . . [I]t represents the choice, and right, of the people to be governed by their citizen peers. To effectuate this result, we must necessarily examine each position in question to determine whether it involves discretionary decision-making, or execution of policy, which substantially

affects members of the political community." 435 U.S. at 296, 17 FEP Cases at 3.

The role of the State Troopers was also described in Foley as one involving "a very high degree of judgment and discretion, the abuse and misuse of which can have serious impact on individuals," 435 U.S. at 298, and as a person who is "vested with . . . plenary discretionary powers." Id.

Both State Troopers and deputy probation officers are generally regarded as being part of the law enforcement apparatus of the community. We have carefully compared the powers and duties of both with particular reference to the above quoted language. In so doing, we have, as required by the teachings of the Supreme Court, given great weight and respect to the determination of the state legislature in requiring citizenship as a condition of employment. But we have nevertheless concluded that the positions are vastly different and that a constitutionally permissible basis does not exist for such a citizenship requirement for deputy probation officers.

The Foley opinion, in describing the role of the State Trooper, emphasizes that he is involved in formulating and executing broad public policy, that he deals with the whole community, and that his actions immediately affect the lives of citizens in all walks of life. It also emphasizes that he is "clothed with authority to exercise an almost infinite variety of discretionary powers." 435 U.S. at 297.

We contrast this with the role of a probation officer in California. In the original opinion we described the probation officer's powers and duties in the following language:

> "Deputy probation officers in California perform a wide range of duties. They include preparation of presentence investigations and recommendations as to sentence, supervision of probationers (including efforts to

ameliorate their employment, health and family problems) and investigation of probation violations. Also included are various duties in connection with juveniles and juvenile courts among which are the filing of juvenile court petitions charging both delinquency and illegal acts, presence at juvenile court hearings in an advisory capacity, placement of minors declared to be wards of the juvenile court and supervising custodial personnel in juvenile incarceration institutions."

For the purposes of this remand, we have given even more careful and detailed consideration to those powers and duties.

No single section of California law spells out in detail all or substantially all of the duties of a probation officer. Bits and pieces of his powers are found in a number of statutes. Some of them may be thought to involve wide and important discretion and authority. For example, a probation officer may arrest a probationer believed to have violated the terms of his probation for the purpose of bringing the probationer before a court. The Court may thereafter, in its discretion, issue a warrant permitting further detention. Penal Code Section 1203.2(a). This limited power of arrest contrasts sharply with the general powers of arrest possessed by State Troopers and even ordinary policemen.

With respect to juveniles, a probation officer, under California Welfare and Institutions Code Section 628, acts as the custodian of a juvenile taken into custody by the police. After making an investigation, the probation officer has the discretion either to release the juvenile to his parents or retain him in custody. The custody will be only for a very short period pending a court hearing. The essential decision

on the subject of custody is thus a judicial one in which the probation officer is but an advisor to the court.[8]

In Foley the Court described State Troopers as exercising the functions traditionally associated with peace officers, i.e. the prevention and detection of crime, apprehension of suspected criminals, execution of warrants, search and seizure for arrest, and the carrying of weapons, 435 U.S. at 293. A California probation officer cannot be said to perform any of those functions except perhaps a limited power of arrest.

Whereas California law gives policemen the many powers mentioned above (Penal Code Section 830.1), the section which confers the status of peace officers on California probation officers (Penal Code Section 830.5) contains words of extreme limitation on the powers of the latter. We read the relevant sections of the Penal Code as allowing a probation officer to act like a policeman only in enforcing compliance by a probationer of the conditions of his pro-

---

[8]The Supreme Court has recently considered the role of a California probation officer in the Fare v. Michael C. 442 U.S. 707 (1979). In that case the question before the Court concerned a minor who, during interrogation by the police, had asked to see a probation officer who had supervised him in other juvenile court problems. No meeting with the probation officer was arranged and the interrogation continued. In the interrogation, the juvenile made damaging admissions which he sought to suppress from the juvenile court proceedings on the ground that the Miranda rule had been violated. The California Supreme Court had upheld the juvenile's contention and likened the function of a probation officer to that of an attorney; a request to see an attorney would require an end to all questioning. The Supreme Court reversed, pointing out that a probation officer has no specialized legal training and has a duty of loyalty to the state, under which he could not withhold, from the police or the courts, facts made known to him by the juvenile as to a crime then under investigation. The undisputed existence of a probation officer's duties to the state for this purpose does not in our view make the probation officer the equivalent of a policeman. The opinion of the Court was directed to matters other than the governmental function exception in the field of alienage with which we are dealing in this case.

bation and in the transportation of a probationer.[9] Moreover, as we point out in Footnote 1, supra, the California legislature does not allow probation officers to carry weapons, which right is indispensable to the function of State Troopers, policemen, and others truly having the powers of a peace officer.

When the functions and powers of a California probation officer are compared side by side with those of a New York State Trooper or any other policeman, the differences are noteworthy. The probation officer's position involves some discretion to be sure, but the discretion is far less important than the policeman's since the probation officer's decisions lack finality and are made advisory to and under the supervision of a judicial officer.

Thus, a probation officer's duties involve substantially less discretion and responsibility than either a schoolteacher's or a policeman's. Just as important is the impact of each employee on the public at large. Public schoolteachers see a great majority of children and are with them many hours of each day through their formative years. Policemen deal with the entire community. Probation officers, on the other hand, deal only with a limited number of persons who have had prior adverse contact with the judicial system. Thus, in terms of the breadth of their constituency and the width of the group they serve, there is in our view

---

[9]Section 830.5 encompasses the recognition of both probation officers and state parole officers as peace officers. Probation officers are appointed by the county, while parole officers are employed by the State Department of Corrections. We read Section 830.5(a)(2), authorizing action in connection with the escape of any inmate from a state institution, to be applicable to parole officers only, and we also read Section 830.5(a)(1) where it refers to parolees to be describing only the authority of parole officers. A contrary interpretation would not in any way change today's result.

a vast distinction between public schoolteachers and policemen on the one hand and probation officers on the other.

For the reasons stated above, we hold that the position of deputy probation officer is not within the political community. Therefore, we must apply the strict scrutiny standard and determine if a compelling state interest exists. In so doing, we reach the same result as we reached in the original opinion and hold that citizenship may not be required for the position of Deputy Probation Officer.

III.

RELIEF

In view of our reaching the same result as reached in the original opinion, the relief decreed will be the same except that the injunctive relief will not be applicable to Plaintiff Chavez-Salido. See Footnote 2, supra. We note that the single judge to whom the case was originally assigned, Judge Hill, awarded attorneys fees to the Plaintiffs. We ratify that award and authorize him to award such further attorneys fees in connection with the appeal, remand, rebriefing, and reargument as he deems appropriate. We also authorize the single judge, Judge Hill, to sign and file a final judgment in the case. Counsel for Plaintiffs will prepare and submit a proposed final judgment within 10 days. If the form of the proposed final judgment is not approved by defense counsel, the latter will have 10 days further in which to file written objections which will not change the result.

Judge Pregerson concurs in this opinion.

DISSENTING OPINION.

CURTIS, Senior District Judge, dissenting: — In our first opinion filed February 3, 1977, we declared section 1031(a) of the California Government Code unconstitutional (1) as overbroad, and (2) in violation of the Equal Protection Clause as applied to the plaintiffs herein. Upon appeal, the Supreme Court has remanded the case "for further consideration in the light of Foley v. Connelie, 435 U.S. 291, 17 FEP Cases 1 (1978)."

I.

FACIAL OVERBREADTH CHALLENGE

Since Foley does not touch on the issue of "overbreadth", if the Supreme Court had accepted our holding on this issue, I would think it would have simply affirmed our decision, at least upon the issue of overbreadth, and that would have been the end of the matter.

But, since it did not do so, and upon remand directs our attention to the issues with which Foley was concerned and no others, I can only conclude that the Supreme Court did not agree with our holding on the issue of overbreadth.

Furthermore, it seems clear to me that plaintiffs would have no standing to challenge the statute as overbroad merely because it included categories of persons not before the court to which plaintiffs did not belong, but as to which the application of the statute might produce an unconstitutional result.

In support of my position I rely upon the Court's statement in United States v. Raines, 362 U.S. 17, 20-21 (1960):

> "The very foundation of the power of the federal courts to declare Acts of Congress unconstitutional lies in the power and duty of those courts to decide cases

and controversies properly before them. This was made patent in the first case here exercising that power — 'the gravest and most delicate duty that this Court is called on to perform.' Marbury v. Madison, 1 Cranch 137, 177-180. This Court, as is the case with all federal courts, 'has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration, 113 U.S. 33, 39. Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional. United States v. Wurzbach, 280 U.S. 396; Heald v. District of Columbia, 259 U.S. 114, 123; Yazoo & Mississippi Valley R. Co. v. Jackson Vinegar Co., 226 U.S. 217; Collins v. Texas, 223 U.S. 288, 295-296; New York ex rel. Hatch v. Reardon, 204 U.S. 152, 160-161. Cf. Voeller v. Neilston Warehouse Co., 311 U.S. 531, 537; Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 513; Virginia R. Co. v. System Federation, 300 U.S. 515, 558, 1 LRRM 743; Blackmer v. United States, 284 U.S. 421, 442; Roberts & Schaefer Co. v. Emmerson, 271 U.S. 50, 54-55; Jeffrey Mfg. Co. v. Blagg, 235 U.S. 571, 576; Tyler v. Judges of the Court of Registration,

and controversies properly before them. This was made patent in the first case here exercising that power — 'the gravest and most delicate duty that this Court is called on to perform.' Marbury v. Madison, 1 Cranch 137, 177-180. This Court, as is the case with all federal courts, 'has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration, 113 U.S. 33, 39. Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional. United States v. Wurzbach, 280 U.S. 396; Heald v. District of Columbia, 259 U.S. 114, 123; Yazoo & Mississippi Valley R. Co. v. Jackson Vinegar Co., 226 U.S. 217; Collins v. Texas, 223 U.S. 288, 295-296; New York ex rel. Hatch v. Reardon, 204 U.S. 152, 160-161. Cf. Voeller v. Neilston Warehouse Co., 311 U.S. 531, 537; Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 513; Virginia R. Co. v. System Federation. 300 U.S. 515, 558, 1 LRRM 743; Blackmer v. United States, 284 U.S. 421, 442; Roberts & Schaefer Co. v. Emmerson, 271 U.S. 50, 54-55; Jeffrey Mfg. Co. v. Blagg, 235 U.S. 571, 576; Tyler v. Judges of the Court of Registration,

179 U.S. 405; Ashwander v. TVA, 297 U.S. 288, 347-348 (concurring opinion)."

The same rule was followed in Broadrick v. Oklahoma, 413 U.S. 601 (1973), when the Court said at 610:

> "Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court. See, e.g., Austin v. The Aldermen, 7 Wall. 694, 698-699 (1869); Supervisors v. Stanley, 105 U.S. 305, 311-315 (1882); Hatch v. Reardon, 204 U.S. 152, 160-161 (1907); Yazoo & M.V.R. Co. v. Jackson Vinegar Co., 226 U.S. 217, 219-220 (1912); United States v. Wurzbach, supra, at 399; Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 513 (1937); United States v. Raines, 362 U.S. 17 (1960)."

It is true that the Court has recognized some limited exceptions to this rule, but only "because of the most 'weighty countervailing policies.' " Broadrick, supra, at 611, citing Raines, supra, at 22-23. Such exceptions have been applied in most instances to cases in which a holding of unconstitutionality on only one aspect of the statute might have an impact upon persons who are not parties to the action, and who would have no effective avenue of preserving their rights themselves. An exception perhaps most often followed is where courts have been inclined to depart to some extent from traditional rules of standing so as to permit attacks on overly broad statutes affecting speech and expression which, unless stricken in their entirety, might remain as a threat or deterrent to constitutionally protected expression.

After enumerating the exceptional situations in which the standing has been allowed, the Court said:

> "Application of the overbreadth doctrine in this manner is, manifestly, strong medicine. It has been employed by the Court sparingly and only as a last resort. Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute. See, Dombrowski v. Pfister, 380 U.S. at 491; Cox v. New Hampshire, 312 U.S. 569 (1941); United States v. Thirty-seven Photographs, 402 U.S. 363 (1971); cf. Breard v. Alexandria, 341 U.S. 622 (1951)."

413 U.S. at 613.

In any event, none of the exceptions pointed out in Broadrick or Raines are applicable in construing section 1031(a), and I would therefore, in reliance upon this rule, deny plaintiffs' standing in this action.

The majority bases its holding of overbreadth upon the concept that the statute "sweeps too broadly" in that it includes occupational categories as to which the application of the citizenship requirement would be clearly unconstitutional. In doing so, it relies upon Sugarman v. Dougall, 413 U.S. 634, 635, 5 FEP Cases 1152 (1973), in which the Supreme Court struck down section 53 of the New York Civil Service Law which provided, "no person shall be eligible for appointment for any position in the competitive class unless he is a citizen of the United States." The Court in Sugarman recognized the right of the state to exclude non-citizens in occupational categories whose members participate directly in the formation and execution of government policy, but held that section 53 was so imprecisely and broadly drawn as to include "many positions with respect to which the State's proffered justification has little, if any, relationship." 413 U.S. at 642.

By way of explaining its decision, the Court said:

> "While we rule that §53 is unconstitutional, we do not hold that, on the basis of an individualized determination, an alien may not be refused, or discharged from, public employment, even on the basis of noncitizenship, if the refusal to hire, or the discharge, rests on legitimate state interests that relate to qualifications for a particular position or to the characteristics of the employee. We hold only that a *flat ban on the employment of aliens in positions that have little, if any, relation to a State's legitimate interest, cannot withstand scrutiny under the Fourteenth Amendment.*
>
> . . .
>
> Neither do we hold that a State may not, in an *appropriately defined class of positions,* require citizenship as a qualification for office."

413 U.S. at 646-47, 5 FEP Cases at 1157 (emphasis added).

The California and New York statutes are clearly distinguishable. The Court found the New York statute to be overbroad because of its failure to define the occupational categories which the state legislature wished to reserve for citizens with that degree of narrowness and precision necessary in order to distinguish between those to whom the statute could be constitutionally applied from those as to whom the statute could not be so applied. The California statute, on the other hand, although it includes a great many different occupational categories, each of these categories are defined with such narrowness and precision as will permit the application of constitutional principles on any category challenged. It is difficult to see how the occupation of probation officer[10] could be more clearly defined.

---

[10]Since the duties of a deputy probation officer are the same as a "probation officer" I make no distinction between the two in this opinion.

I would hold therefore that section 1031(a) of the California Government Code should be upheld as against an attack for overbreadth.

II.

VALIDITY AS APPLIED

Although the Courts have held that state classifications based on alienage are, for purposes of equal protection analysis, "inherently suspect and subject to close judicial scrutiny." (Graham v. Richardson, 403 U.S. 365, 372 (1971)), in Foley the Court created a significant exception where certain governmental functions are involved.

> "The individual, [upon becoming a citizen], belongs to the polity and is entitled to participate in the processes of democratic decision-making. Accordingly, we have recognized 'a State's historical power to exclude aliens from participation in its democratic political institutions.' [Sugarman v. Dougall, 413 U.S. 634, 648, 5 FEP Cases 1152 (1973)], as part of the sovereign's obligation ' "to preserve the basic conception of a political community." ' 413 U.S., at 647, 5 FEP Class at 1157.
>
> The practical consequence of this theory is that 'our scrutiny will not be so demanding where we deal with matters firmly within a State's constitutional prerogatives.' [Sugarman], supra, at 648, 5 FEP Cases at 1157. The State need only justify its classification by a showing of some rational relationship between the interest sought to be protected and the limiting classification."

435 U.S. at 295-96, 17 FEP Cases at 2-3.

In Ambach v. Norwick, 441 U.S. 68, 19 FEP Cases 467 (1979), decided after Foley and subsequent to remand of the instant case, the Foley holding was further clarified. Said the Court:

> "The rule for governmental functions, which is an exception to the general standard applicable to classifications based on alienage, rests on important principles inherent in the Constitution. The distinction between citizens and aliens, though ordinarily irrelevant to private activity, is fundamental to the definition and government of a State."

441 U.S. at 75, 19 FEP Cases at 470.

Governmental Function Test.

After discussing the limited right of a state to require citizenship for certain positions, the Court provided the following guidelines for determining the applicability of the Foley exception to strict scrutiny analysis:

> "[W]e must necessarily examine each position in question to determine whether it involves discretionary decisionmaking, or execution of policy, which substantially affects members of the political community."

435 U.S. at 296, 17 FEP Cases at 3.

In Ambach, which involved a challenge to a citizenship requirement for teaching in the public schools, the Court further developed the governmental function test:

> "In determining whether, for purposes of equal protection analysis, teaching in public schools constitutes a governmental function, we look to the role of public education and to the degree of responsibility and discretion teachers possess in fulfilling that role."

441 U.S. at 75, 19 FEP Cases at 470.

Therefore, in determining whether the strict scrutiny or rational basis analysis should be applied, this court must apply the governmental function test to determine: (1) the degree of discretionary decisionmaking afforded probation officers under the system, and (2) the role of the probation system in the governmental structure.

In Foley, the Court was confronted with a New York State statute requiring New York State Troopers to be citizens. The Court upheld the statute's citizenship requirement on the ground that such a trooper was a member of the State Police Force, a law enforcement body which exercises broad police authority throughout the state. After discussing in some detail the varying duties which the police are called upon to perform, the Court states:

> "Clearly the exercise of police authority calls for a very high degree of judgment and discretion, the abuse or misuse of which can have serious impact upon individuals."

435 U.S. at 298, 17 FEP Cases at 4.

Both the Supreme Court of the United States and the Supreme Court of the State of California have recognized the very high degree of discretion and responsibility required of a probation officer in the performance of his duties. In Gagnon v. Scarpelli, 411 U.S. 778, 784 (1973), the Court said:

> "Because the probation or parole officer's function is not so much to compel conformance to a strict code of behavior as to supervise a course of rehabilitation, he has been entrusted traditionally with broad discretion to judge the progress of rehabilitation in individual cases, and has been armed with the power to recommend or even to declare revocation."

In In re Wayne H., 24 Cal.3d, 595, 601, 156 Cal.Rptr. 344, 596 P.2d 1 (1979)[11] the Supreme Court of the State of California, in discussing the responsibilities of a pro-

---

[11]Although the Fare v. Michael C., 442 U.S. 707 (1979) opinion places portions of the California Supreme Court's opinion in In re Wayne H. in doubt, the portion dealing with the responsibilities and discretionary powers of the probation officer are in no way affected.

bation officer while conducting a juvenile investigation to determine whether the juvenile should be further detained, said:

> "While the purposes of such an interview are relatively restricted, however, the latitude given the probation officer in reaching a detention decision, and the effect of that decision on the minor, are substantial."

Probably the most sensitive area in which police officers and probation officers are both called upon to exercise discretion and judgment is in the making of arrests of individuals in appropriate cases. Any arrest by whomever made is a major intrusion upon the life of the victim and the entrusting of the power and discretion upon a public officer to make or withhold an arrest is a matter of the highest concern to the state. While it is true a police officer deals with a broad segment of the citizenry, whereas a probation officer deals with a very narrow segment of the population, an arrest by a probation officer requires no less a degree of judgment or discretion than an arrest by a police officer. Any abuse or misuse of such power by either can have just as severe an impact on the individual arrested and upon society at large.

I would find no difficulty in holding that the duties of a probation officer involves a very high degree of discretionary decisionmaking which substantially affects members of the political community.

In Ambach, the Court held that teachers pursuing their role in the public education system fulfill a most fundamental obligation of government to its constituency. 441 U.S. at 78-79. The Court further said in summary:

> "Thus, through both the presentation of course materials and the example he sets, a teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen's social responsibilities."

Id. at 79, 19 FEP Cases at 471 (footnote omitted).

While a teacher has both the duty and the opportunity on a day-to-day basis to work with a broad segment of school children, a probation officer through his role has the duty and the opportunity by suggestion, supervision, example, and instruction of bringing the same kind of influence to a narrow class of problem individuals, selected because of their antisocial behavior, upon whom the impact of such influence is even more critically needed than by the normal child in the public classroom.

The majority, in distinguishing between the duties of a police officer and a teacher, on the one hand, and a probation officer, on the other, places great reliance upon the fact that policemen and school teachers exercise their discretion and responsibility in a great variety of situations and deal with large segments of the community. In my view, however, the determining factor is not the size of the arena in which the policemen or teachers exercise their judgment and discretion, or the number of times in a given period that they are called upon to exercise such judgment, nor the great variety of occasions upon which they are called to act. What is important is the weight of the impact which these judgments, when made, have upon the process of state government.

Jurors have been held so closely associated with the state's democratic political institutions that these positions may be reserved for citizens. See Perkins v. Smith. 379 F.Supp. 134 (Md. 1974), aff'd, 426 U.S. 913 (1976). Yet, a juror does not confront a broad segment of the citizenry, nor does he exercise a multitude of functions on a great number of occasions. He may only set on one case in a lifetime, but upon this one occasion he serves such a vital part of the state's judicial function that the courts have recognized the state's right to insist that only citizens fill this role.

The probation system, and its probation officers through which it is enforced, play an integral role in the operation of the judicial system. Almost every sentence imposed by any judge upon a criminal offender is fashioned in large measure upon the recommendation of a probation officer. The impact of such recommendations upon the judicial process is only slightly less than the decision made by the judge himself and equates favorably in importance with anything done by a police officer, a teacher or a juror in furthering the governmental function.

Application of the Rational Basis Test

In the light of the foregoing considerations, therefore, I would hold that probation officers come clearly within the "governmental function" principle recognized in Sugarman, Foley and Ambach.

It cannot be disputed that the State of California has a legitimate interest in the efficient operation of a law enforcement system in this state in which a probation officer plays an important part. Since the Constitution only requires that a citizenship requirement applicable to a probation officer bear a rational relationship to a legitimate state interest I would hold that the statute meets the rational test and should be applied.

Accordingly, I dissent.

APPENDIX B.

Final Judgment.

United States District Court, Central District of California.

Jose Chavez-Salido, et al, Plaintiffs, v. County of Los Angeles, et al, Defendants. No. CV 76-0541-IH.

Filed: Aug. 15, 1980.

Entered: Aug. 19, 1980.

In this matter, an order of the Three-Judge District Court denominated "Partial Judgment" was filed on February 23, 1977. The said Partial Judgment was pursuant to an opinion of the three-judge court and was published at 427 F.Supp. 158. Pursuant to authority granted in the said Partial Judgment, District Judge Hill rendered a Final Judgment, which was filed May 27, 1977, and is unpublished. The judgment of the three-judge court of February 23, 1977, was vacated by the Supreme Court and the matter was remanded to the three-judge court for further consideration. 436 U.S. 901 (1978). The said Final Judgment of District Judge Hill was vacated and remanded by the Court of Appeals for the Ninth Circuit by an unpublished order of that court filed May 14, 1979.

Pursuant to the remand of the Supreme Court, the three-judge District Court again heard argument in the matter on December 8, 1979. Appearances before the Three-Judge District Court (and thereafter at hearings of the one-judge court) were: for Plaintiffs, Legal Aid Foundation of Los Angeles by Richard A. Paez, Esq.; for Defendants, John H. Larson, County Counsel, Los Angeles County, by Philip H. Hickok, Deputy County Counsel.

The three-judge court decided the statute in question unconstitutional in a two-judge majority opinion filed June 4, 1980, and published at .... F.Supp. ..... Judge Curtis dissented. The three-judge court authorized Judge Hill to make

findings of fact and conclusions of law on the issue of damages and attorney's fees and to file a final judgment in the matter.

Argument on the matters referred to him for decision was held before Judge Hill on August 1, 1980, and he, on that date, announced findings and conclusions as to the issues referred to him. Such findings and conclusions were rendered orally. A transcript of Judge Hill's remarks on August 1, 1980, shall be filed when produced which shall constitute his said findings and conclusions.

It is appropriate that this final judgment shall now be filed, containing both the orders and judgment of the three-judge court and the orders and judgment of District Judge Hill under authority granted to him by the three-judge court. Since the orders and judgment of the three-judge court are contained in this document, it has been prepared for the signature of both Circuit Judge Pregerson and District Judge Hill, who constitute the majority of said three-judge court.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED *by the Three-Judge District Court:*

1. Judgment shall be entered on behalf of Plaintiffs, Jose Chavez-Salido, Ricardo Bohorquez and Pedro Luis Ybarra, and against Defendants, relief as follows:

(a) California Government Code Sec. 1031(a), on its face and as applied to Plaintiffs, was and is in violation of the Fourteenth Amendment to the United States Constitution in that it denies Plaintiffs equal protection of the laws and it is, therefore, void and unenforceable;

(b) The actions of Defendant County of Los Angeles by and through its employees in denying Plaintiffs employment solely because of their alien status was and is in violation of 42 U.S.C. Sec. 1981;

(c) The actions of the individual Defendants and their successors in office in denying Plaintiffs employment solely because of their alien status was and is in violation of 42 U.S.C. Sec. 1983;

(d) Defendant County of Los Angeles and the individual Defendants and their successors in office are hereby permanently enjoined from enforcing and/or applying California Government Code Sec. 1031(a) against Plaintiffs Ricardo Bohorquez and Pedro Luis Ybarra.

2. The request for damages in the form of back pay by Plaintiffs Jose Chavez-Salido and Pedro Luis Ybarra is referred to Chief District Judge Irving Hill for resolution. Chief Judge Hill shall have the authority to enter any further orders and judgment on the issue of damages and other appropriate relief as he deems just and proper in accordance with the three-judge court opinions of February 3, 1977, and June 4, 1980.

3. Plaintiffs' request for attorneys' fees pursuant to 42 U.S.C. Sec. 1988 is also referred for determination to Chief District Judge Irving Hill. He shall have authority to award attorneys' fees in connection with the judgment previously entered in this action, the appeal, remand and rebriefing, and reargument, as he deems appropriate.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by *District Judge Irving Hill* under authority granted by the three-judge court:

4. Plaintiffs Jose Chavez-Salido and Pedro Luis Ybarra shall, in addition to the relief granted to them by the three-judge court, recover damages as follows:

(a) Plaintiff Jose Chavez-Salido is awarded damages in the amount of $10,526.47 against Defendant County of Los Angeles;

(b) Plaintiff Pedro Ybarra is awarded damages in the amount of $8,521,42 against Defendant County of Los Angeles.

5. Plaintiff Ricardo Bohorquez is denied damages. However, Defendant County of Los Angeles shall restore Plaintiff Bohorquez to the eligibility list for Deputy Probation Officer II — Spanish-speaking with a score of 90.

6. Pursuant to the provisions of the Civil Rights Attorney's Fees Award Act of 1976, Pub.Law 94-559, 42 U.S.C. Sec. 1988, Plaintiffs' counsel are awarded reasonable attorneys' fees in the amount of $24,572. Said fees shall be paid by Defendant County of Los Angeles.

7. Interest, at the rate of 7% per annum, shall be paid on the award of attorneys' fees and damages from August 4, 1980.

8. The Court shall reserve jurisdiction over this action to allow Plaintiffs' counsel, if appropriate, to move the Court for an award of additional attorneys' fees for time expended on any appeal from this Judgment.

DATED: August 4, 1980.

/s/ HARRY PREGERSON
Harry Pregerson, Judge
U.S. Court of Appeals, 9th Circuit

/s/ IRVING HILL
Irving Hill, Judge
United States District Court

United States District Court Central District of California.

Jose Chavez-Salido, et al, Plaintiff(s), vs County of Los Angeles, et al, Defendant(s). Case Number CV 76-541-IH.

NOTICE OF ENTRY

TO THE ABOVE NAMED PARTIES AND TO THEIR ATTORNEY(S) OF RECORD:

You are hereby notified that FINAL JUDGMENT in the above entitled case was entered in the docket on Aug 19 1980.

You are also notified that if this case was tried and you introduced exhibits into evidence, they must be claimed at this office *after* the expiration of thirty days from the receipt of this notice. (After *sixty* days in cases in which the United States, its officers or agencies were parties) Unless they are claimed within thirty days after the expiration of the above period, they will be destroyed pursuant to Local Rule 20(a). If an appeal is taken they will, of course, be held until the Appellate Court finally determines the matter. Exhibits which are attached to a pleading will not be destroyed but will remain as a permanent record in the case file.

CERTIFICATE OF MAILING.

I, Edward M. Kritzman, Clerk, United States District Court, Central District of California, and not a party to the within action, hereby certify that on Aug 19 1980, I served a true copy of this notice of entry on the parties in the within action by depositing true copies thereof, enclosed in sealed envelopes, in the United States Mail in the United States

Post Office mail box at Los Angeles, California, addressed as follows:

County Counsel
648 Hall of Administration
500 West Temple St.
Los Angeles, Ca. 90012

Richard A. Paez
Western Center on Law and Poverty
1709 West 8th St., Ste 600
Los Angeles, Ca. 90017

EDWARD M. KRITZMAN, Clerk
By R.L. BYER,
Deputy Clerk

NOTICE

IN ACTIONS ARISING UNDER THE ECONOMIC STABILIZATION ACT, THE EMERGENCY PETROLEUM ALLOCATION ACT, AND THE ENERGY POLICY AND CONSERVATION ACT, NOTICES OF APPEAL TAKEN FROM THIS JUDGMENT MUST BE FILED IN THE TEMPORARY EMERGENCY COURT OF APPEALS IN ACCORDANCE WITH THE RULES OF PROCEDURE OF THAT COURT.

APPENDIX C.

Notice of Appeal to the Supreme Court of the United States.

United States District Court, Central District of California.

Jose Chavez-Salido, et al., Plaintiffs, v. Clarence E. Cabell, etc., Defendants. No. CV-76-0541-IH.

Filed: Oct. 20, 1980.

Notice is hereby given that the County of Los Angeles, Kenneth F. Fare, Harry Hufford and Jackie Hasenstab, defendants above named, hereby appeal to the Supreme Court of the United States from the entire final judgment entered on August 19, 1980.

This appeal is taken pursuant to 28 U.S.C. §1253.

DATED: October 20, 1980.

Respectfully submitted,

JOHN H. LARSON
County Counsel

By /s/ WILLIAM F. STEWART
William F. Stewart, Chief
Labor Relations Division

Attorneys for Defendants.

United States District Court, Central District of California.

Jose Chavez-Salido, et al., Plaintiff(s), vs Clarence E. Cabell, etc., Defendant(s). Case Number CV-76-0541-IH.

PROOF OF SERVICE /
ACKNOWLEDGEMENT OF SERVICE

I, the undersigned, certify and declare that I am over the age of 18 years employed in the County of Los Angeles, State of California, and not a party to the above-entitled

cause. On October 20, 1980, I served a true copy of NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES ( ) by personally delivering it to the person(s) indicated below in the manner as provided in FRCivP 5(b); (XX) by depositing it in the United States Mail in a sealed envelope with the postage thereon fully prepaid to the following:

Richard A. Paez
Western Center on Law and Poverty
1709 West 8th St., Ste 600
Los Angeles, CA 90017

All parties required to be served have been served.

Place of Mailing: Los Angeles, California.

Executed on October 20, 1980 at Los Angeles, California.

( ) I hereby certify that I am a member of the Bar of the United States District Court, Central District of California.*

(XX) I hereby certify that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.*

*/s/ BARBARA B. MacNAIR
Signature of person making service.

United States District Court, Central District of California.

Jose Chavez-Salido, et al., Plaintiff(s), vs. Clarence E. Cabell, etc., Defendant(s). Case Number CV-76-0541-IH.

PROOF OF SERVICE /
ACKNOWLEDGEMENT OF SERVICE

I, the undersigned, certify and declare that I am over the age of 18 years employed in the County of Los Angeles, State of California, and not a party to the above-entitled

cause. On October 20, 1980, I served a true copy of NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES ( ) by personally delivering it to the person(s) indicated below in the manner as provided in FRCivP 5(b); (X) by depositing it in the United States Mail in a sealed envelope with the postage thereon fully prepaid to the following:

RICHARD A. PAEZ
LEGAL AID FOUNDATION OF LOS ANGELES
1550 West Eighth Street
Los Angeles, CA 90017

MARY S. BURDICK
WESTERN CENTER ON LAW AND POVERTY INC.
3535 West Sixth Street
Los Angeles, CA 90020

All parties required to be served have been served.

Place of Mailing: Los Angeles, California.

Executed on October 20, 1980 at Los Angeles, California.

( ) I hereby certify that I am a member of the Bar of the United States District Court, Central District of California.*

(XX) I hereby certify that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.*

* /s/ BARBARA A. MacNAIR
Signature of person making service.

APPENDIX D.

Opinion.

Jose Chavez-Salido et al., Plaintiffs, v. Clarence E. Cabell, in his official capacity as Acting Chief Probation Officer of Los Angeles County, et al., Defendants. No. CV 76-0541-1H.

United States District Court, C. D. California. Feb. 3, 1977.

Addendum to Opinion March 14, 1977.

Resident aliens, who sought employment as deputy probation officers, brought suit challenging a California statute providing that one must be a citizen of the United States to hold any governmental position, state, county or local, which is declared by law to be a peace officer or which has the powers of a peace officer. A Three-Judge District Court, Irving Hill, J., held that the statute denied equal protection on its face and as applied to the resident aliens.

Partial judgment for plaintiffs.

Richard A. Paez, Michele Washington, Western Center on Law and Poverty, Inc., Los Angeles, Cal., for plaintiffs.

Philip H. Hickok, Deputy County Counsel, Los Angeles, Cal., for defendants.

Before BARNES, Senior Circuit Judge, CURTIS, Senior District Judge, and IRVING HILL, District Judge.

HILL, District Judge:

In this opinion, in a case of first impression, we declare unconstitutional California Government Code § 1031(a). That section provides that one must be a citizen of the United States to hold any governmental position, state, county or local, which is declared by law to be a peace officer or which has the powers of a peace officer. The case is brought by three plaintiffs who applied for, and were denied, ap-

pointment to the position of Los Angeles County deputy probation officer solely because of the statutory requirement of American citizenship. Under California Penal Code § 830.5 a deputy probation officer is declared to be a peace officer and is therefore subject to the citizenship requirement of Government Code § 1031(a). We hold § 1031(a) to be both unconstitutional on its face and unconstitutional as applied. We also hold that a county may be held liable for damages in an action brought directly under the 14th Amendment and in an action brought under 42 U.S.C. § 1981.

I.

FACTS.

Plaintiffs, Chavez-Salido, Ybarra and Bohorquez, as of the date the complaint was filed, were lawfully admitted permanent resident aliens living in Los Angeles County. In a single-count first amended complaint seeking both injunctive relief and damages, they sue Los Angeles County, its Chief Personnel Officer, its Acting Chief Probation Officer and the Personnel Officer of the County's Probation Department.[1] The case was tried without live witnesses. Most of the facts were stipulated to and some additional facts were received by uncontradicted affidavits.

Each of the plaintiffs has applied for appointment to the County Probation Department as a Deputy Probation Officer II. This position carries a salary of $1,185 per month. There are some factual differences in the status of the three plaintiffs and in the treatment accorded their applications.

---

[1]Defendant Nesvig has been succeeded as Chief Personnel Officer of the County by Harry L. Hufford. Defendant Cabell has been succeeded as Chief Probation Officer of the County by Kenneth Fare. In both situations the present incumbent has been substituted for his predecessor under Fed.R.Civ.P. 25(d)(1).

Chavez-Salido has resided here as a lawfully admitted permanent resident alien since 1955. His application to become a Deputy Probation Officer II was filed on March 27, 1975. An oral examination is given for this position, with 70 being the minimum passing grade. Chavez-Salido took the examination May 1, 1975, scored 95, and was notified that he was being placed on the eligibility list. In September, 1975, he was notified that a job opening existed. But shortly thereafter he was told he would have to show proof of citizenship to receive an appointment. Being unable to do so, he was denied employment. The denial is stipulated to have been solely the result of the citizenship requirement of Government Code § 1031(a).

The County also has a position called Deputy Probation Officer Trainee, paying substantially less than Deputy Probation Officer II. The Trainee position does not require citizenship since it is not given by law the status or powers of peace officer. Chavez-Salido was offered the Trainee position on December 1, 1975 and accepted it. He had applied for American citizenship well before applying to become a probation officer. His citizenship petition was granted and he was made a citizen on March 15, 1976. However, by that time, his name had been taken off the eligibility list for Deputy Probation Officer II. In August, 1976, he was promoted to the position of Deputy Probation Officer I. The Officer I position pays more than the Trainee position but less than the Officer II position and citizenship is required for it.

Plaintiff Ybarra has been a lawfully admitted permanent resident alien since 1972. On August 22, 1975 he applied for the position of Deputy Probation Officer II. He scored 70 on the examination. On the same date Ybarra also applied for the Trainee position. On October 8, 1975 he applied for the position of Deputy Probation Officer I. He passed the

Officer I examination with a score of 80. He was told that he was qualified for both probation officer positions, that there was a job open in the I category, but no job was open in the II category although he would be placed on an eligibility list for the latter. He was also told that for both probation officer positions he was required to present proof of citizenship. Being unable to do so, he was denied the Officer I appointment and a position on the eligibility list for Officer II. It is again stipulated that these denials were solely the result of the statutory citizenship requirement. Ybarra was employed by the Los Angeles City Housing Authority during the entire application and examination period and apparently is still so employed. Ybarra has not to this date applied for American citizenship.

Plaintiff Bohorquez has been a lawfully admitted permanent resident alien since 1961. At the time the case was argued, he had never applied for American citizenship and, so far as we know, has still not done so. His application for the position of Deputy Probation Officer II was filed January, 1975. He was given the oral examination on May 5, 1975 but during the examination was told that he could not receive an appointment to the position sought because of his lack of citizenship. He was subsequently notified that he had failed to achieve a passing score of 70 on the examination. There is a procedure whereby an applicant can appeal his examination results. Bohorquez was notified that because he failed to meet the citizenship qualifications it would be useless to appeal. He therefore did not appeal and has refrained from filing further applications, though he is still desirous of appointment. Bohorquez was unemployed at the time of his application and examination and has remained unemployed since. It appears that he never sought appointment as a Probation Officer Trainee. Whereas Chavez-Salido and Ybarra seek damages by way of back

pay as part of their relief, Bohorquez seeks only the opportunity to take a new examination.

Each plaintiff was at all times willing to take the loyalty oath prescribed in the California Constitution for all public employees. Cal.Const. art. XX, § 3. That oath includes an agreement to support and defend the Federal and State Constitutions.

The first amended complaint, upon which the case was tried,[2] challenges § 1031(a) and the citizenship requirement therein contained, under the equal protection clause of the 14th Amendment and under two provisions of the Civil Rights Acts, 42 U.S.C. §§ 1981 and 1893. These challenges articulate a claim of unlawful discrimination on the basis of alienage. In addition, the complaint asserts that § 1031(a) unconstitutionally infringes upon plaintiffs' right to travel and upon Congress' power to regulate aliens. The latter claim invokes the supremacy clause of the Federal Constitution. Each plaintiff seeks a declaratory judgment invalidating the statute and injunctive relief prohibiting its application to him. All three plaintiffs seek attorneys fees. As stated, two plaintiffs seek money damages.

Plaintiffs requested the convening of a three-judge court under 28 U.S.C. §§ 2281 and 2284[3] Defendants agreed that a three-judge court should be convened and the Chief Judge of the Circuit appointed the members of the three-judge

---

[2]The first amended complaint was originally drawn as a class action. Before the trial, by stipulation of all parties, an order was entered striking all class action claims and aspects.

[3]During the pendency of the action, Congress enacted new legislation substantially limiting the availability of three-judge courts. The Three-Judge Court Amendments of 1976, Pub.L. No. 94-381, 90 Stat. 1119. The new law by its terms does not apply to actions commenced before its enactment, i.e. August 2, 1976, and thus the instant case was unaffected by the new statute.

court on April 26, 1976.[4] The case was tried and argued August 20, 1976.

II.

JURISDICTION.

The individual defendants do not contest the jurisdiction of this court to entertain the instant action against them. They apparently concur in plaintiffs' assertion that a claim is stated against them which is cognizable under 42 U.S.C. § 1983, with jurisdiction accruing to this Court under 28 U.S.C. § 1343(3). Section 1983 imposes liability on any *person* who, under color of state law, deprives another of "any rights, privileges, or immunities secured by the Constitution . . .." Section 1343(3) grants to the district courts original jurisdiction to redress any deprivation of constitutional rights of the type described in § 1983.

---

[4]We are aware, of course, of the teaching of the Supreme Court in *Hagans v. Lavine*, 415 U.S. 528, 95 S.Ct. 1372, 39 L.Ed.2d 577 (1974). *Hagans* holds that before resorting to a three-judge court, the single district judge should exhaust all potentially dispositive claims within his jurisdiction. The claim in the instant case of invalid state intrusion into the federal power to regulate immigration is not based on any alleged conflict between § 1031(a) and any specific federal law or regulation. Plaintiffs refer only generally to the Immigration and Naturalization Act, 8 U.S.C. § 1101 *et seq*. *Hagans* describes a claim that direct conflict between a specific state statute and a specific Congressional enactment renders the state statute "unconstitutional". The opinion in *Hagans* denominates such a conflict claim as "statutory" and differentiates it from a claim of a clearly constitutional nature. *Hagans* holds that the single district judge must decide such a statutory claim before requesting that a three-judge court be convened to consider other claims. The supremacy clause claim of the plaintiffs here, like their other claims of unconstitutionality, derives "exclusively and directly from the Federal Constitution rather than from federal legislation [and] entail[s] an immediate resort to the Constitution . . .." *Norwick v. Nyquist*, 417 F.Supp. 913, 916 (S.D.N.Y.1976). All of the claims of the instant plaintiffs are of a clearly constitutional nature. None of the claims is "statutory" in the *Hagans* context. Therefore, in our view, a three-judge court was properly convened.

But Defendant Los Angeles County does contest our jurisdiction. Plaintiffs argue that their complaint states a claim against the County both for violation of their equal protection rights under the 14th Amendment and for violation of 42 U.S.C. § 1981. Section 1981 in relevant part reads:

> "All persons within the jurisdiction of the United States shall have the same right in every State . . . to make and enforce contracts, to sue, . . . and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . .."

Plaintiffs argue that if a claim is stated under either or both of these bases, our jurisdiction over the County derives from 28 U.S.C. § 1331(a), the general grant to the district courts of federal question jurisdiction. Section 1331(a) confers jurisdiction in all civil actions which arise "under the Constitution, laws, or treaties of the United States" and "wherein the matter in controversy exceeds the sum of value of $10,000 . . .."

Defendant County strongly urges that it, as a political subdivision, is not suable under § 1981. The County unfortunately took no position, either in its brief or in argument, as to plaintiffs' asserted alternative basis of liability, i.e. direct violation of the 14th Amendment. We have examined both bases as well as the question of the existence in the case of the $10,000 amount in controversy requirement under § 1331(a).

We hold that the complaint states a cognizable claim against the County on both 14th Amendment and § 1981 grounds and that the amount in controversy exceeds $10,000. Therefore, we hold that this court has jurisdiction of the claim against the County under § 1331(a).

(A) *The Section 1981 Claim*

It is settled that the right to be free from illegal discrimination in employment is encompassed within the right "to make and enforce contracts" protected by § 1981. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975). *Johnson* involved racial discrimination in employment. In *Graham v. Richardson*, 403 U.S. 365, 277, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971) the Supreme Court held that aliens are within the class protected by § 1981 and may utilize that section as plaintiffs. *Graham* involved welfare benefits. Although neither the Supreme Court nor our Circuit have spoken on the question of alienage discrimination in employment, the Fifth and Seventh Circuits in carefully considered opinions, and a number of district courts, have held that § 1981 applies to discrimination in employment based on alienage as well as to employment discrimination which is racially based.[5] We choose to follow those holdings.

So we turn to the question of whether an action under § 1981 may be maintained against a political subdivision of a state.

Since *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961) it has been established law that a political subdivision of a state is immune from a damage claim under § 1983 because it is not a "person". And that im-

---

[5]*Guerra v. Manchester Terminal Corp.*, 498 F.2d 641 (5th Cir. 1974); *Roberto v. Hartford Ins. Co.*, 177 F.2d 811 (7th Cir. 1949), *cert. denied*, 339 U.S. 920, 70 S.Ct. 622, 94 L.Ed. 1343 (1950); *Spiers v. C. Itoh & Co. (America), Inc.*, 408 F.Supp. 916 (S.D.Tex.1976); *Hollander v. Sears, Roebuck & Co.*, 392 F.Supp. 90 (D.Conn.1975); *Mohamed v. Parks*, 352 F.Supp. 581 (D.Mass.1973); *Lopez v. White Plains Housing Authority*, 355 F.Supp. 1016 (S.D.N.Y.1972); *League of Academic Women v. Regents of Univ. of Calif.*, 343 F.Supp. 636 (N.D.Cal.1972). *Cf. Campbell v. Gadsden County District School Board*, 534 F.2d 650 (5th Cir. 1976).

munity has been extended to claims for injunctive relief. *City of Kenosha v. Bruno*, 412 U.S. 507, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973).

Since §§ 1981 and 1983 are parts of what is generally called the Civil Rights Acts, it is tempting to argue that a political subdivision's immunity from suit under one section extends to the others. And our Circuit in *Arunga v. Weldon*, 469 F.2d 675 (9th Cir. 1972) appears to have accepted that argument, holding that a political subdivision is also not amenable to suit under § 1981. The County's claim that it cannot be sued under § 1981 is founded almost exclusively on *Arunga*.

We have pondered the *Arunga* opinion and in so doing, we have examined the record and the briefs. We believe, with the utmost respect, that *Arunga* may have been insufficiently considered and that it reaches an incorrect result. One district court in this district has previously declined to follow *Arunga*, *League of United Latin American Citizens v. City of Santa Ana*, 410 F.Supp. 873 (C.D.Cal.1976), and we do likewise. We alsc believe that whatever authority *Arunga* has, has been undermined by language in a more recent decision of the Supreme Court.

Arunga was an action brought in *pro. per.* by a black legally admitted resident alien of Kenyan nationality. He sued the City of Alameda and one of its police officers (who was never served) for a claimed physical assault arising out

of an allegedly unlawful arrest.[6] The trial court twice granted the City's motion to dismiss for lack of jurisdiction. The first grant was with permission to amend, and following submission of an amended complaint, the second dismissal was granted without leave to amend. The appeal followed. In the Court of Appeals the matter was submitted without

---

[6]Arunga's papers throughout the record demonstrate that he was both unlearned and confused. The amended complaint is in one count; its jurisdictional paragraph cites only § 1983. A later paragraph merely mentions §§ 1981 and 1985 along with § 1983. The complaint does not mention § 1986 at all. The gravamen of the complaint is a prayer for money damages of $1.5 million dollars as general and exemplary damages for the assault upon plaintiff and his physical and mental suffering. Some of the damages sought for mental suffering are claimed to be for the emotional effect upon plaintiff of his grandfather's premature death resulting from the "humiliation" to plaintiff. Plaintiff denominated his case as a class action and for some obscure reason prayed that a three-judge court be convened for the purpose of declaring unconstitutional Article 11, Section 11 of the California Constitution which confers local police power upon counties and cities.

In the City's original motion to dismiss, the points and authorities supporting it consisted of one sentence which asserted that "a city is not a 'person' under 42 U.S.C. §§ 1981-88". The motion to dismiss the amended complaint was likewise supported by a single sentence argument as follows:

> "Plaintiff's 'AMENDED PLEADING' adds nothing except jibberish and still fails to state a cause of action against the City." *Diamond v. Pitchess*, 411 F.2d 565 (9th Cir. 1969); *Brown v. Town of Caliente*, 392 F.2d 546 (9th Cir. 1968).

Diamond and Brown are both § 1983 cases declaring municipal immunity. The trial court in neither of its dismissal orders cited any authority or stated any reason.

Arunga's brief on appeal does not mention § 1981 and does not even mention the suability of a political subdivision under any of the Civil Rights Acts. His brief is almost entirely devoted to the three-judge court issue and a discussion of state police power. The city's brief on appeal devotes only seven lines to the suability question, as follows:

> "It is clear that a City may not be sued under 42 U.S.C. §§ 1981-85. *Monroe v. Pape*, 365 U.S. 167 [81 S.Ct. 473, 5 L.Ed.2d 492] (1961); *Moor v. Madigan* [458], F.2d [1217] (9th Cir. No. 71-3019; 71-3020, March 1972); *Diamond v. Pitchess*, 411 F.2d 565 (9th Cir. 1969); *Brown v. Town of Caliente*, 392 F.2d 546 (9th Cir. 1968). Under the authorities cited, the District Court was unquestionably correct in dismissing plaintiff's action as to the City."

argument. The opinion is per curiam and in two short paragraphs:

> "The plaintiff filed an action against the City of Alameda alleging that he had been deprived of rights in violation of 42 U.S.C. §§ 1981 and 1986. The complaint was dismissed on motion upon the ground that the city is not a 'person' and cannot be sued under the Civil Rights Act. [sic] An amended pleading based upon the same statute against the same defendant was again dismissed and this appeal taken.
>
> It is abundantly clear that a municipal corporation is not a 'person' subject to suit under 42 U.S.C. 1983. *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961); *Moor v. Madigan*, 458 F.2d 1217 (9th Cir. 1972); *Diamond v. Pitchess*, 411 F.2d 565 (9th Cir. 1969). The district court was unquestionably correct and we affirm." (Footnote omitted).

We believe the first sentence of the opinion to be factually incorrect because we cannot find in the amended complaint any claim of a violation of § 1986. The second paragraph of the opinion, which contains the holding, makes what we believe a fundamental error with respect to § 1981, i. e. the assumption that liability is imposed by § 1981 only upon "persons". Whereas § 1983 does use that term defining who is liable, § 1981 does not use the term nor does it limit in any way who may be liable as a defendant for a violation.

It is unfortunate but understandable that the *Arunga* opinion assumes that various of the Civil Rights Acts (42 U.S.C. § 1981 through § 1988) and particularly §§ 1981, 1982 and 1983, should be construed and applied according to common rules and principles. This approach may well result from the fact that all of the substantive Civil Rights Acts were

codified together in 1874 in the Revised Statutes.[7] But it ignores certain other important historical facts: (1) that §§ 1981 and 1982, which are companion sections, were originally enacted in 1866, whereas § 1983 did not become law until 1871[8] and (2) that §§ 1981 and 1982 are derived from, and based upon, the 13th Amendment, whereas § 1983 was enacted to implement the 14th Amendment.[9]

As the Supreme Court points out in *Monroe*, the legislative history of § 1983 and the use of the term "person" therein, preclude its application to political subdivisions. But a careful examination of the legislative history of §§ 1981 and 1982 establishes, we think, with equal clarity, that political subdivisions were intended to be included within their ambit. The legislative history of § 1981 to which we refer has been extensively collated by at least three other district courts. *Robinson v. Conlisk*, 385 F.Supp. 529 (N.D.Ill.1974); *Maybanks v. Ingraham*, 378 F.Supp. 913 (E.D.Pa.1974); *League of United Latin American Citizens v. City of Santa Ana, supra*. It serves no useful purpose for us to duplicate or reproduce those discussions; we incorporate them by reference.

The Supreme Court, post-*Arunga*, has said in analyzing § 1982:

---

[7]For further discussion of the history of the codification, see *Runyon v. McCrary*, 427 U.S. 160, 168 n. 8, 96 S.Ct. 2586, 2593 n. 8, 49 L.Ed.2d 415 (1976).

[8]With respect to the other parts of what has been called "The Civil Rights Acts", §§ 1987 and 1988 enacted along with §§ 1981 and 1982, in 1866, and § 1986 was adopted with § 1983, as part of the Ku Klux Klan Act of 1871, ch. 22, § 1, 17 Stat. 13. A part of § 1985 was originally enacted in 1861, but the present full § 1985 was also adopted in 1871. Section 1984, which grants no substantive rights, was not enacted until 1875. Act of March 1, 1875, ch. 114, § 5, 18 Stat. 337.

[9]In addition to §§ 1981 and 1982, §§ 1987 and 1988 are also based upon the 13th Amendment while §§ 1985 and 1986, along with § 1983 were enacted pursuant to the 14th Amendment.

> "[L]ike the Amendment upon which it is based, § 1982 is not a 'mere prohibition of State laws establishing and upholding racial discrimination in the sale and rental of property, but rather [is], an 'absolute' bar to all discrimination, private as well as public, federal as well as state." *District of Columbia v. Carter*, 409 U.S. 418, 422, 93 S.Ct. 602, 605, 34 L.Ed.2d 613 (1974).

We read this language as an affirmation that all sources of discrimination, including governmental entities, are reachable under § 1982.

Because they are companion sections, having a common derivation and legislative history, it would appear that what applies to § 1982 applies with equal force to § 1981.[10]

Unfortunately, the Supreme Court has not yet decided the question of whether political subdivisions are suable under § 1981. One circuit and a number of district courts have held, as we hold, that they are.[11] Two district courts outside our Circuit, relying on *Arunga*, have held that they are not.[12] The lack of a definitive Supreme Court decision and the paucity of other authority since *Arunga* probably results from the passage of the 1972 amendments to Title VII of the Civil Rights Act of 1964, making political sub-

---

[10] *Jones v. Alfred Mayer Co.*, 392 U.S. 409, 422 n. 78, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968); *Bowers v. Campbell*, 505 F.2d 1155, 1157-58 (9th Cir. 1974); *Macklin v. Spector Freight Systems, Inc.*, 156 U.S.App.D.C. 69, 478 F.2d 979, 993-94 (1973).

[11] *Campbell v. Gadsden County District School Board, supra* note 5; *League of United Latin American Citizens v. City of Santa Ana*, 410 F.Supp. 873 (C.D.Cal.1976); *Robinson v. Conlisk*, 385 F.Supp. 529 (N.D.Ill.1974); *Hines v. D'Artois*, 383 F.Supp. 184 (W.D.La.1974); *Maybanks v. Ingraham*, 378 F.Supp. 913 (E.D.Pa.1974).

[12] *Redding v. Medica*, 402 F.Supp. 1260 (W.D.Pa.1975); *Black Brothers v. City of Richmond*, 386 F.Supp. 147 (E.D.Va.1974).

divisions amenable to suit under Title VII for discrimination in employment.[13] The confusion caused by *Arunga* leads us to the fervent hope that our Circuit will shortly have occasion to take a second look at the legal question decided in it.

(B) *The 14th Amendment Claim*

A claim cognizable in this court is stated against the County under the 14th Amendment. Relatively recent authority makes clear that political subdivisions of states are answerable in the district courts for direct constitutional violations in a complaint seeking injunctive relief, damages or both, despite the absence of any statute specifically creating the cause of action.

In 1971 the Supreme Court held in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) that, without an enabling statute, liability in damages existed for direct constitutional violations with district court jurisdiction being found in § 1331(a). The defendants in *Bivens* were federal FBI agents and the direct constitutional violation alleged was a 4th Amendment violation. No extension of *Bivens* to agents of state or local government was needed since 42 U.S.C. § 1983 provided a specific remedy in the federal courts against them, and 28 U.S.C. § 1343(3) provided clear federal jurisdiction.

Utilizing the Bivens rationale, the Supreme Court later *clearly* implied that an action may be brought in the federal courts against political subdivisions of states for direct constitutional violations including 14th Amendment violations.

---

[13]Plaintiffs in our case cannot resort to Title VII because discrimination based on alienage is not included within the types of discrimination prohibited by it. *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86, 94 S.Ct. 334, 38 L.Ed.2d 287 (1974).

City of Kenosha v. Bruno, supra[14] After twice declining to decide that question[15] our own Circuit has now specifically decided it. Relying on *Kenosha*, the Circuit held that political subdivisions of states may be sued for both damages and equitable relief for constitutional violations, with jurisdiction being provided by § 1331(a). *Gray v. Union County Intermediate Education Department*, 520 F.2d 803, 805 (9th Cir. 1975).[16] *Gray* involved a school district but the court characterized a school district as a "political subdivision" of a state. *Id.*

(C) *Amount In Controversy*

Having determined that a claim "arising under the Constitution" and one also arising "under the laws" of the United States are presented, we have jurisdiction of that

---

[14]Plaintiffs were holders of retail store and tavern liquor licenses whose renewal applications had been denied by the two defendant cities under procedures set up by state statute. Alleging that their renewal applications were unconstitutionally denied, they sought injunctive relief including a declaration that the statutes involved were unconstitutional. A three-judge district court held that a claim under § 1983 was properly pled against the cities because only equitable relief was sought, and found jurisdiction under § 1343(3). The Supreme Court reversed the § 1983 holding but remanded the case rather than ordering judgment for the defendant cities. The remand order assumed that jurisdiction might well exist under § 1331(a) if the requisite amount in controversy was shown to exist. Two Justices, in a concurring opinion, viewed the remand as a holding by the Court, for the first time, that jurisdiction existed under § 1331(a) for actions against a city charging direct constitutional violations. See concurring Opinion of Brennan, J., 412 U.S. at 516, 93 S.Ct. 2222.

[15]*Aldinger v. Howard*, 513 F.2d 1257 (9th Cir. 1975), *aff'd*, 427 U.S. 1, 96 S.Ct. 2413, 49 L.Ed.2d 276 (1976); *Ybarra v. City of Town of Los Altos Hills*, 503 F.2d 250 (9th Cir. 1974).

[16]The Third and Fifth Circuits and other district courts are in accord that direct constitutional causes of action may be maintained against political subdivisions of states. *Reeves v. City of Jackson*, 532 F.2d 491 (5th Cir. 1976); *Skehan v. Board of Trustees*, 501 F.2d 31 (3rd Cir. 1974); *Redding v. Medica*, 402 F.Supp. 1260 (W.D.Pa. 1975); *Williams v. Brown*, 398 F.Supp. 155 (N.D.Ill.1975); *Maybanks v. Ingraham, supra*, note 11; *Dahl v. Palo Alto*, 372 F.Supp. 647 (N.D.Cal.1974). But *Cf. Brault v. Town of Milton*, 527 F.2d 730 (2d Cir. 1975) (*en banc*).

claim under § 1331(a) if the "amount in controversy exceeds $10,000."

The amount in controversy must be found to exist under § 1331(a) as to each plaintiff. *Zahn v. International Paper Co.*, 414 U.S. 291, 94 S.Ct. 505, 38 L.Ed.2d 511 (1973). If attention is focused solely on the amount of awardable money damages, one might entertain a substantial doubt about the existence of the requisite $10,000 jurisdictional requirement in this case. No plaintiff pleads money damages in any specific amount. One plaintiff seeks no money damages at all. The other two, who were employed in other positions during the period in question, seek damages consisting of "back pay and seniority benefits". If each of those plaintiffs must offset,by way of mitigation, the wages and benefits earned at other work, it is quite clear that neither could be awarded damages which exceed $10,000.[17]

But it is not proper, in deciding the amount in controversy, to focus solely on the money damage aspect of this case. Equitable relief, by way of injunction, is also sought here. In *Glenwood Light & Water Company v. Mutual Light, Heat & Power Co.*, 239 U.S. 121, 36 S.Ct. 30, 60 L.Ed. 174 (1915), the Court said of injunctive actions:

> " . . . The jurisdictional amount is to be tested by the value of the object to be gained by the complainant." 239 U.S. at 125, 36 S.Ct. at 32.

And of civil rights actions under 28 U.S.C. § 1331, it has been said that the amount in controversy is the value

---

[17]The difference in pay between the trainee position accepted by Chavez-Salido and the position he now seeks is $333 per month and the period of denial is less than 18 months. As to Ybarra, the evidence indicates that he earned an average of about $900 per month during the denial period in the job at the Housing Authority. For Ybarra, the denial period does not exceed 14 months.

of the right to be protected. 1 Moore's Federal Practice § 0.96[3.-1] at 939.[18]

Where a case involves denial of employment or dismissal from employment, courts have held that the amount in controversy may be met by considering the value of the job in question, i.e. the amount of money which plaintiff would earn in the job for the indefinite future or for the rest of his work expectancy. *Friedman v. International Association of Machinists*, 95 U.S. App.D.C. 128, 220 F.2d 808, 810 (1955); *Hiss v. Hampton*, 338 F.Supp. 1141, 1146 (D.D.C. 1972); *White v. Bloomberg*, 345 F.Supp. 133, 141 (D.Md.1972). We adopt that rule and under it, the case of each plaintiff amply meets the $10,000 amount in controversy requirement. The value of the position of Deputy Probation Officer II, which is the "object to be gained" by the complaint, exceeds $10,000.

Since we have found that a claim is stated against the County under both the 14th Amendment and § 1981 which

---

[18]We are mindful that some courts have in effect ignored the $10,000 jurisdictional requisite in cases involving claims of violation of constitutional rights. These courts seem to hold that constitutional rights are so precious that, by definition, they are in every case worth more than $10,000. *See e.g. Spock v. David* 69 F.2d 1047 (3d Cir. 1972)., *reargued*, 502 F.2d 953 (3d Cir. 1974), *reversed on other grounds sub nom. Greer v. Spock*, 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976); *CCCO-Western Region v. Fellows*, 359 F.Supp. 644 (N.D.Cal. 1972); *West End Neighborhood Corp. v. Stans*, 312 F.Supp. 1066 (D.D.C.1970). This view apparently stems from the separate opinion of Mr. Justice Stone in *Hague v. C.I.O.*, 307 U.S. 496, 529, 59 S.Ct. 954, 83 L.Ed. 1423 (1939). There is substantial contra authority. *See e.g. Goldsmith v. Sutherland*, 426 F.2d 1395 (6th Cir.) *cert. denied*, 400 U.S. 960, 91 S.Ct. 353, 27 L.Ed.2d 270 (1970); *Giancana v. Johnson*, 335 F.2d 366 (7th Cir. 1964), *cert. denied*, 379 U.S. 1001, 85 S.Ct. 718, 13 L.Ed.2d 702 (1965). In the absence of any decision on the point from our Circuit we decline to follow the cases first-above cited which find the amount in controversy invariably present because constitutional rights are not capable of valuation in monetary terms. For a full discussion of the entire problem, see the footnote in *Gomez v. Wilson*, 155 U.S.App.D.C. 242, 477 F.2d 411, 420 n.56 (1973).

is cognizable in a district court, and that the jurisdictional amount in controversy exists, we find jurisdiction against the County is granted to us under § 1331(a).[19]

* * *

III.

THE MERITS

In three recent cases the Supreme Court has invalidated state statutes or regulations requiring citizenship as a condition of obtaining public employment or licenses.[20] In *Sugarman v. Dougall*, 413 U.S. 634, 93 S.Ct. 2842, 37 L.Ed.2d 853 (1973) the Court struck down a provision of the New York Civil Service Law which required citizenship for appointment to any position in the state's classified civil service. There were four named plaintiffs, all permanent legal resident aliens, who sued for themselves and for a class. Two of the plaintiffs were clerk-typists, one was a human resources technician, and the fourth an administrative assistant.

---

[19]We also note, *sua sponte*, that jurisdiction of the claim against the County may also exist under another jurisdictional statute, 28 U.S.C. § 1343(4).

Section 1343(4) is a grant to the district courts of original jurisdiction in any civil action "[t]o recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights . . . ." Section 1343(4) is not broad enough to cover a charge of direct violation of the 14th Amendment since the section is limited to civil actions arising "under any Act of Congress". But since we hold that the County is amenable to suit in a § 1981 action, § 1343(4) would give us jurisdiction and without respect to the amount in controversy. *Bowers v. Campbell*, 505 F.2d 1155 (9th Cir. 1974); *Campbell v. Gadsden County District School Board*, 534 F.2d 650 (5th Cir. 1976).

[20]See also the summary affirmance by the Supreme Court in *Lefkowitz v. C.D.R. Enterprises, Ltd.*, ... U.S. .... , 97 S.Ct. 721, 50 L.Ed.2d 742 (1977), *aff'g C.D.R. Enterprises, Ltd. v. Board of Education of City of New York*, 412 F.Supp. 1164 (E.D.N.Y.1976) (three-judge).

The Court's opinion emphasized the overbroad and indiscriminate nature of the statute, i.e. that the class of positions for which citizenship was required "reached . . . positions in nearly the full range of work tasks, . . . all the way from the menial to the policy making." *Id.* at 640, 93 S.Ct. at 2846. The opinion noted that citizenship was not required for the unclassified civil service within which many of the higher policy making decisions were included. The Court categorically rejected the claim that a state can confine public jobs, paid for by public resources, to citizens of the country. While observing that each state had the power to prescribe the qualifications of voters, elective office holders and holders of "important nonelective executive, legislative and judicial positions . . . [and] officers who participated directly in the formulation, execution, or review of broad public policy . . .," the Court emphasized that such a statute must be "narrowly confined". *Id.* at 647, 93 S.Ct. at 2850. In a provocative and much discussed passage the Court said:

> "We recognize a State's interest in establishing its own form of government, and in limiting participation in that government to those who are within 'the basic conception of a political community.' *Dunn v. Blumstein*, 405 U.S. 330, 344 [92 S.Ct. 995, 1004, 31 L.Ed.2d 274] (1972). We recognize, too, the State's broad power to define its political community. But in seeking to achieve this substantial purpose, with discrimination against aliens, the means the State employs must be precisely drawn in light of the acknowledged purpose." *Id.* at 642-43, 93 S.Ct. at 2848.

In re Griffiths, 413 U.S. 717, 93 S.Ct. 2851, 37 L.Ed.2d 910 (1973), decided the same day as *Sugarman*, struck down a rule of the Connecticut court system requiring citizenship as a prerequisite for admission to the bar. Plaintiff was a

long-time resident of the United States who was married to an American citizen and thus apparently entitled to remain here indefinitely. The Court rejected the argument that the special role of the lawyer within the governmental system justified excluding aliens from the practice of law. Although a Connecticut lawyer is denominated as a "commissioner" of the Superior Court with the right to sign writs and subpoenas, acknowledge deeds, administer oaths, take depositions and command the assistance of sheriffs and constables in the exercise of his authority, the Court stressed that these duties did not involve matters of such high policy or responsibility as would authorize a state to entrust them only to citizens. As in *Sugarman*, the Court stressed the duties imposed on resident aliens, which include the same obligation to pay taxes, and serve in the Armed Forces as are imposed on citizens. It observed that while lawyers (and other state employees) are required to take an oath to support the Federal and State Constitutions, such oath is customarily administered to resident aliens inducted into the Armed Forces and is thus deemed to be consistent with citizenship in a foreign country. The Court concluded that Connecticut had failed to establish any compelling state interest in confining law practice to citizens.

In *Examining Board of Engineers v. De Otero*, 426 U.S. 572, 96 S.Ct. 2264, 49 L.Ed.2d 65 (1976), the Court struck down a statute of Puerto Rico restricting the issuance of licenses for the practice of civil engineering in the private sector, to U.S. Citizens. Puerto Rico was held to be "territory" within the ambit of federal civil rights and jurisdictional statutes. Among the justifications advanced by Puerto Rico for requiring citizenship was the claim that citizen engineers are more likely to be present in the community and to be financially more accountable than noncitizens, a matter of significance since engineers may be liable for

malpractice for ten years under local law. Another justification offered was that by confining the privilege of practicing engineering to citizens, Puerto Rico could prevent the uncontrolled influx of Spanish-speaking aliens into this professional field. A third justification offered was to raise the prevailing low standard of living. The Court held that these justifications, like those of New York in *Sugarman* and Connecticut in *Griffiths*, were inadequate.[21]

From these opinions of the Supreme Court we can abstract the rules of law which we must apply in judging the California statute in question here. First, the equal protection guarantee as embodied in the 14th Amendment extends to permanent resident aliens. Second, a state statute or regulation classifying citizens and noncitizens and attaching disabilities to noncitizenship, involves a "suspect classification". Third, any "suspect classification" is subject to strict judicial scrutiny; for the statute to survive the state must establish (1) that the suspect classification [alienage] serves a compelling state interest, (2) that the classification is reasonably necessary to promote that compelling state interest, and (3) that the statute be narrowly and precisely drawn so as to avoid a classification that "sweeps too broadly".

---

[21]In *Hampton v. Mow Sun Wong*, 426 U.S. 88, 96 S.Ct. 1895, 48 L.Ed.2d 495 (1976), the Supreme Court held unconstitutional a Civil Service Commission regulation requiring citizenship for practically all federal civil service positions. The holding that the Civil Service Commission was without power to exclude noncitizens from such a wide range of positions is a relatively narrow one. The Court said that such power, if it exists at all, belongs only to Congress and held that the exercise of such power by the Commission violated due process. The opinion contains interesting language which hints that Congressional, or even Presidential, action requiring citizenship as a pre-requisite for federal government employment and justified as an inducement for immigrants to become citizens, might be valid. This inducement to citizenship justification has not been dealt with in any prior opinion of the Supreme Court or in any prior judicial opinion cited to us. It was not advanced in the instant case.

We now proceed to measure the California statute, which is the subject of the instant case, against these criteria.

In relevant part, California Government Code § 103(a) provides:

> "In any instance in which . . . members of a class of public officers or employees are . . . *declared by law to be peace officers or to have the powers of peace officers*, each member of such class must meet at least the following minimum standards:
>
> (a) Be a *citizen* of the United States."
>
> (Emphasis added)

California Penal Code § 830 and various subsections thereunder provide a very long list of occupations and positions classified as peace officers or having the powers thereof. Deputy probation officers are included.[22] contains

---

[22] *Under § 830.1*

sheriff
undersheriff
deputy sheriff
policeman
marshal
deputy marshal
constable
deputy constable

Under § 830.2

highway patrolmen
members of the California State Police Division
members of the California National Guard when called into active service by the Governor
members of the University of California police department
members of a state college police department

Under § 830.3

officers and special agents of the Department of Justice, Bureau of Criminal Identification and Investigation
officers and agents of the Bureau of Narcotic Enforcement
investigators in the office of a district attorney
the Director and enforcement officers of the Department of Alcoholic Beverage Control
officers and investigators of the Division of Investigation of the Department of Consumer Affairs
investigators of the Board of Medical Quality Assurance
members and deputies of the Wildlife Protection Branch, Department of Fish and Game

(footnote continued on following page)

the entire list which ranges all the way from important law enforcement positions to positions having apparently insignificant and menial duties. Included in the latter group are sextons and superintendents of a cemetery authority and other cemetery employees, inspectors of the Bureau of Furniture and Bedding Inspection, sealers of the Department of Weights and Measures and messengers of the State Treasurer's Office.

---

county fish and game wardens
State Forester and employees of the Division of Forestry
voluntary fire wardens
officers and manager of compliance services of the Department of Motor Vehicles
investigators of the Department of Motor Vehicles
Secretary and Chief Investigator of the California Horse Racing Board
racetrack investigators of the California Horse Racing Board
police officers of a regional park district
state fire marshal, and deputy fire marshals members of an arson-investigating unit of a fire department.
members of a fire department of a local agency
inspectors of the Bureau of Food and Drug
park rangers
members of a community college police department
investigators of the Division of Labor Law Enforcement

Under § 830.4

security officers of the California State Police Division
Sargeant at Arms of each house of the Legislature
Baliffs of the Supreme Court and the courts of appeal
guards and messengers of the State Treasurer's Office
director and employees of the Department of Navigation and Ocean Development
the administrator of a state hospital and police officers designated by him
railroad or steamboat company policemen commissioned by the Governor
sextons and superintendents of cemeteries
other cemetery personnel designated by a cemetery authority (See Health and Safety Code § 8325)
harbor policemen
special officers of the Department of Airports of the City of Los Angeles
the chief of toll services of the Department of Transportation and his captains, lieutenants and sergeants employed on vehicular crossings
members of a security patrol of a school district
authorized federal employees engaged in enforcing applicable state or local laws on federal property
Los Angeles County security guards
airport policemen designated by the Monterey Peninsula Airport District

The only justification advanced by the defendants in this case as a compelling state interest is the one described in *Sugarman*, the State's power to define its "political community". We read the references in *Sugarman* to the "political community" for which the State may prescribe citizenship as a requisite of office, as being confined to high policy making officers. When confronted with this reading,

airport security officers at airports operated by San Francisco, Orange or San Joaquin Counties
housing authority patrol officers employed by the housing authorities of Los Angeles or Contra Costa Counties
Under § 830.5
parole officers of the Department of Corrections
placement or parole officers of the Youth Authority
probation officers
deputy probation officers
warden, superintendent, supervisor or guards employed by the Department of Corrections any employee having custody of a ward in an institution of the Youth Authority
transportation officers of the Youth Authority
Under § 830.5a
agents of the law liaison unit of the Department of Corrections
Under § 830.6
persons deputized or appointed as a reserve or auxiliary sheriff, deputy sheriff or city policeman
In addition to the above, the following have the powers of peace officers:
Any person summoned to the aid of any uniformed police officer as in a posse comitatus (Penal Code § 830.6[b])
the director, officers and employees of the Division of Aeronautics (Pub.Util.Code § 21252) any person vested with the power of enforcing any provisions of the Agriculture Code (Agric. Code §7)
county fire wardens and assistant and deputy fire wardens (Government Code § 24008)
inspectors of the Board of Dental Examiners (Business and Professions Code § 1704)
inspectors of the Bureau of Furniture and Bedding Inspection (Business and Professions Code § 19206)
inspectors of the Bureau of Livestock Identification (Agric. Code § 20432)
mental health counselors (Welfare and Institutions Code § 6778)
officers and employees of the state park system (Public Resources Code § 5008)
sealers of the Department of Weights and Measures (Business and Professions Code § 12013)

defendants argue that the California statute in issue is applicable to only a "few" positions which are either "high level" or require "demanding discretional decisions in their everyday execution." We cannot agree with the defendants. It is obvious from the long list of covered positions contained in the footnote that the statute is much broader than they claim and covers many positions with much less responsible duties than they describe. The claimed "political community" justification in this case, therefore, does not support this statute any more than it supported the requirement of citizenship for the classified civil service in New York State in *Sugarman*.

But even if we assume *arguendo* that the California statute serves a compelling state interest and employs a classification reasonably necessary to promote that compelling state interest, we would have to strike it down on the ground that it is not narrowly and precisely drawn and that it "sweeps too broadly."[23]

Although the concept was not discussed in the briefs, at the argument of the case, the court and counsel discussed whether the validity of § 1031(a) should be considered as applied, i.e. as limited to the position of deputy probation officer which is the position sought by all three plaintiffs.

The prior decisions of the Supreme Court dealing with alienage, which we have discussed above, would appear to rule out consideration of the validity of this statute as applied. Those decisions stress that the scrutiny which should

---

[23]In various constitutional and statutory provisions, California requires citizenship as a qualification for holding statewide elective office including Governor and Lieutenant Governor and for holding certain top executive positions in state government. *See e.g.* Cal.Const. art. 5, §§ 2 and 9 and Government Code §§ 241, 1001 and 1020. We express no view as to the validity of those provisions; they are not in issue here.

be afforded to such a statute must include an examination of whether it is too broad in its sweep, overinclusive. That is why we, as the Court did in *Sugarman*, have examined all of the types of positions for which citizenship is required. But we are also aware that in other contexts, the Supreme Court has resorted to the "as applied" technique for the announced purpose of avoiding advisory opinions and unnecessary constitutional adjudication, especially where the outer parameters of the state statute are cloudy and unadjudicated. *See, e.g., United States v. Raines*, 362 U.S. 17, 20-22, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960). So, out of an abundance of caution, we proceed to examine § 1031(a) as applied.

The evidence before us contains no description of the duties performed by a deputy probation officer in California. However, counsel stipulated at the argument that we may take judicial notice of those duties based on our experience as judges. It is fortunate that all three members of this court had extensive experience as state court judges in California before appointment to the federal bench.

Deputy probation officers in California perform a wide range of duties. They include preparation of presentence investigations and recommendations as to sentence, supervision of probationers (including efforts to ameliorate their employment, health and family problems) and investigation of probation violations. Also included are various duties in connection with juveniles and juvenile courts among which are the filing of juvenile court petitions charging both delinquency and illegal acts, presence at juvenile court hearings in an advisory capacity, placement of minors declared to be wards of the juvenile court and supervising custodial personnel in juvenile incarceration institutions. Important as those duties are, we cannot characterize a deputy probation officer as an employee who participates "directly in

the formulation, execution, or review of broad public policy . . . ." *Sugarman, supra,* 413 U.S. at 647, 93 S.Ct. at 2850. Since a compelling state interest appears only when the requirement of citizenship is confined to positions of that type, the statute must be condemned even as applied. As in *Griffiths,* we would find that the duties of a deputy probation officer "hardly involve matters of state policy or acts of such unique responsibility as to entrust them only to citizens." 413 U.S. at 724, 93 S.Ct. at 2856. A similar approach has recently been taken in a well-reasoned opinion of a three-judge district court striking down a New York statute requiring public school teachers to be citizens. *Norwick v. Nyquist,* 417 F.Supp. 913 (S.D.N.Y.1976). If neither lawyers nor teachers can be required to be citizens, it would seem to us an *a fortiori* proposition that citizenship cannot be required for deputy probation officers.[24]

Having held that § 1031(a) violates the equal protection clause of the 14th Amendment, it follows that the denial of employment to the plaintiffs pursuant to § 1031(a) involves a violation of 42 U.S.C. § 1981 by the County and a violation of 42 U.S.C. § 1983 by the individual defendants. The County has denied to these plaintiffs the "same right . . . to make and enforce contracts . . ." as are enjoyed by citizens (§ 1981). The individual defendants have denied these plaintiffs "under color of [a State] statute . . . [the] rights, privileges, or immunities secured by the Constitution . . . ." (§ 1983).

---

[24]Our opinion, in striking down § 1031(a) on its face and as applied, should not be read as holding that California could not constitutionally enact a citizenship requirement for a narrowly confined class of the most important peace officers. We do not decide, for example, whether county sheriffs or city police chiefs are within the state's "political community" or whether a citizenship requirement for them would be reasonably necessary to promote such a compelling state interest.

Our decision herein should come as no shock or surprise either to the defendants in the instant case or to other California officials. Since no California court has passed upon the constitutionality of Government Code § 1031(a) up to this time the officials of Los Angeles County have apparently felt constrained to observe its requirements. But the California Attorney General seven years ago declared it to be unconstitutional.[25] His opinion appears correctly to have anticipated the Supreme Court's *Sugarman* decision. Additionally, the California Supreme Court in 1969 struck down a statute prohibiting the employment of aliens on public works[26] and, even before the Supreme Court spoke in *Griffiths*, invalidated a citizenship requirement for the practice of law.[27] And the California legislature, in 1970, repealed a blanket statute which required that every employee of the state and every county or city therein must be a citizen.[28] So the direction of the tide has been clear. One need not have qualified as a soothsayer to have predicted our present holding.[29]

Since we have declared § 1031(a) to be unconstitutional because it discriminates illegally on the basis of alienage

---

[25]53 Cal.Atty.Gen.Opin. 63 (1970).

[26]*Purdy & Fitzpatrick v. State*, 71 Cal.2d 566, 79 Cal.Rptr. 77, 456 P.2d 645 (1969) (invalidating Labor Code § 1850).

[27]*Raffaelli v. Committee of Bar Examiners*, 7 Cal.3d 288, 101 Cal.Rptr. 896, 496 P.2d 1264 (1972).

[28]*See* Historical Note preceding California Labor Code § 1960.

[29]It would have been preferable, in the interests of harmonious federal-state relationships, for plaintiffs to have sought relief in the state courts instead of mounting their initial challenge in the federal courts. In the lights of the above-mentioned California decisions and Attorney General's opinion, it appears that a 14th Amendment challenge in the state courts might well have succeeded. However, in our view, plaintiffs' bypass of state court remedies, for whatever reason, does not warrant abstention on our part.

the claims of plaintiffs involving the right to travel and intrusion on Congress' immigration powers are rendered moot. We decline to discuss or decide those claims.

IV.

RELIEF

If the statute is declared unconstitutional, defendants do not appear to dispute the specific relief sought by the various plaintiffs except as to damages and attorneys fees.

All three plaintiffs seek a declaratory judgment that Government Code § 1031(a) is unconstitutional and an injunction preventing its enforcement against them. Such declaratory judgment and injunction shall issue. The judgment will run against all defendants and will bind the successors in office of the individual defendants.

As to Plaintiff Chavez-Salido, the judgment will contain an order requiring his immediate appointment to the position of Deputy Probation Officer II—Spanish Speaking, with seniority rights retroactive to September, 1975. As to Plaintiff Ybarra, the judgment will contain an order requiring his immediate appointment to the position of Deputy Probation Officer I with seniority benefits retroactive to January, 1976. The judgment will further order his restoration to the eligibility list for Deputy Probation Officer II—Spanish Speaking, retroactive to November, 1975.

As to Plaintiff Bohorquez, the judgment will contain an order directing defendants to invalidate the results of the examination for Deputy Probation Officer II—Spanish Speaking, which he took in May, 1975 and requiring them immediately to give him another test. Should Bohorquez pass the new test, the judgment will order him restored to the eligibility list for that position retroactive to May, 1975.

We pass now to the issue of damages. Plaintiffs have formally renounced any intention to seek a damage award against any individual defendant.[30] Thus the court is not required to consider certain difficult questions of governmental employee immunity which would arise if money damages were sought against the individuals.

However, plaintiffs do press their claim for money damages against the County. It is settled that a county is not clothed with the immunity from money damage awards enjoyed by a state under the 11th Amendment, unless the county's damage obligation would be paid out of the state treasury. *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). The County makes no showing that if damages are awarded against it, they must be paid from state funds. Thus, the County is not immune. But whether damages should be awarded against the County under the facts of this case is a matter that we, as a three-judge court, decline to decide at this point.

The parties have neither briefed nor argued for us a number of questions related to a possible damage award against the County. These include (1) whether damages are compelled or discretionary, (2) if discretionary, what factors should be considered in exercising that discretion, and (3) the measure of damages, including whether there should be an offset by way of mitigation for sums earned in other employment. We therefore refer the matter of damages to the single judge to whom the case was originally assigned for further consideration by him. He will have authority to enter any further judgment on the issue which he deems appropriate. One difficult question to be considered by the single judge is whether damages should be awarded at all

---

[30]See the stipulation of counsel filed Jan. 13, 1976 which renounces both damages and attorneys fees as against the individual defendants.

where the act complained of as being illegal was the County's observance of the clear and unequivocal mandate of a state statute which had not been declared unconstitutional by any court.

The plaintiffs also seek attorneys fees, but only against the County. At the time of the filing of this action and its trial, it appeared that attorneys fees were not awardable in civil rights damage actions except where specific authority to award them was contained in the applicable statute. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975). And, there was no specific statutory authority for fees which applied to our case. However, after the argument, a new statute on the subject became effective which authorizes discretionary awards of attorneys fees to the prevailing party in certain civil rights matters. The Civil Rights Attorney's Fees Awards Act of 1976, Pub.L.No. 94-559, 90 Stat. 2641. The new Act is not expressly applicable to cases pending on the date of its enactment, but a recent action of the Supreme Court indicates that it may well be,[31] and a recent district court decision so holds.[32]

It is therefore appropriate for us also to refer the attorneys fees question to the single judge to whom the case was originally assigned, with authority to decide it.

This opinion will constitute this court's findings of fact and conclusions of law as to the issues herein decided and the partial judgment herein ordered. Counsel for plaintiffs will prepare and submit a partial judgment within ten days. Defense counsel, if the proposed partial judgment is not

---

[31]See the summary disposition in *Stanton v. Bond*, ... U.S. .... , 97 S.Ct. 479, 50 L.Ed.2d 581 (1976).

[32]*Wade v. Mississippi Cooperative Extension Service*, 424 F.Supp. 1242 (N.D.1976).

approved by him as to form, will have ten days further in which to file written objections which will not change the result. The single district judge to whom the case was assigned, after deciding the unresolved questions referred to him herein, may sign and file a final judgment in the case.

ADDENDUM TO OPINION

Following the filing of our Opinion on February 3, 1977, we became aware for the first time of an *en banc* decision of our Circuit in *Sethy v. Alameda Co. Water District*, 545 F.2d 1157 (9th Cir. 1976). It was published in Federal Reporter (2d Series) after our Opinion was filed. In *Sethy*, the Circuit appears to overrule *Arunga v. Weldon*, 469 F.2d 675 (9th Cir. 1972) and explicitly holds that a municipal subdivision may be sued under § 1981. Our Opinion is in accord with the *Sethy* decision and *Sethy* in no way affects either the rationale or the result we reached herein.

APPENDIX E.

§ 131.4. Probation officer and deputies; performance of duties; powers over probationers; courts served by officers

Any of the duties of the probation officer may be performed by a deputy probation officer and shall be performed by him whenever detailed to perform the same by the probation officer; and it shall be the duty of the probation officer to see that the deputy probation officer performs his duties.

Such probation officer and each deputy probation officer shall have, as to the person so committed to the care of such probation officer or deputy probation officer, the powers of a peace officer.

The probation officers and deputy probation officers appointed under section 131.2 of this code shall serve as such probation officers in all courts having original jurisdiction of criminal actions in this State. (Added by Stats.1939, c. 1093, § 5.)